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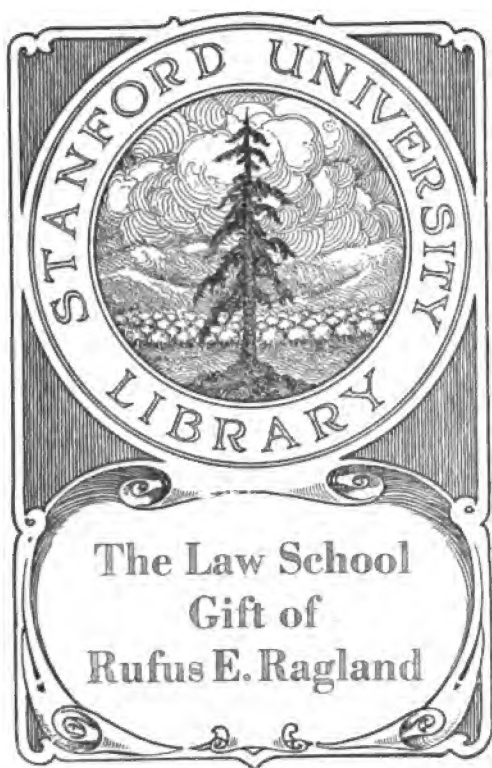
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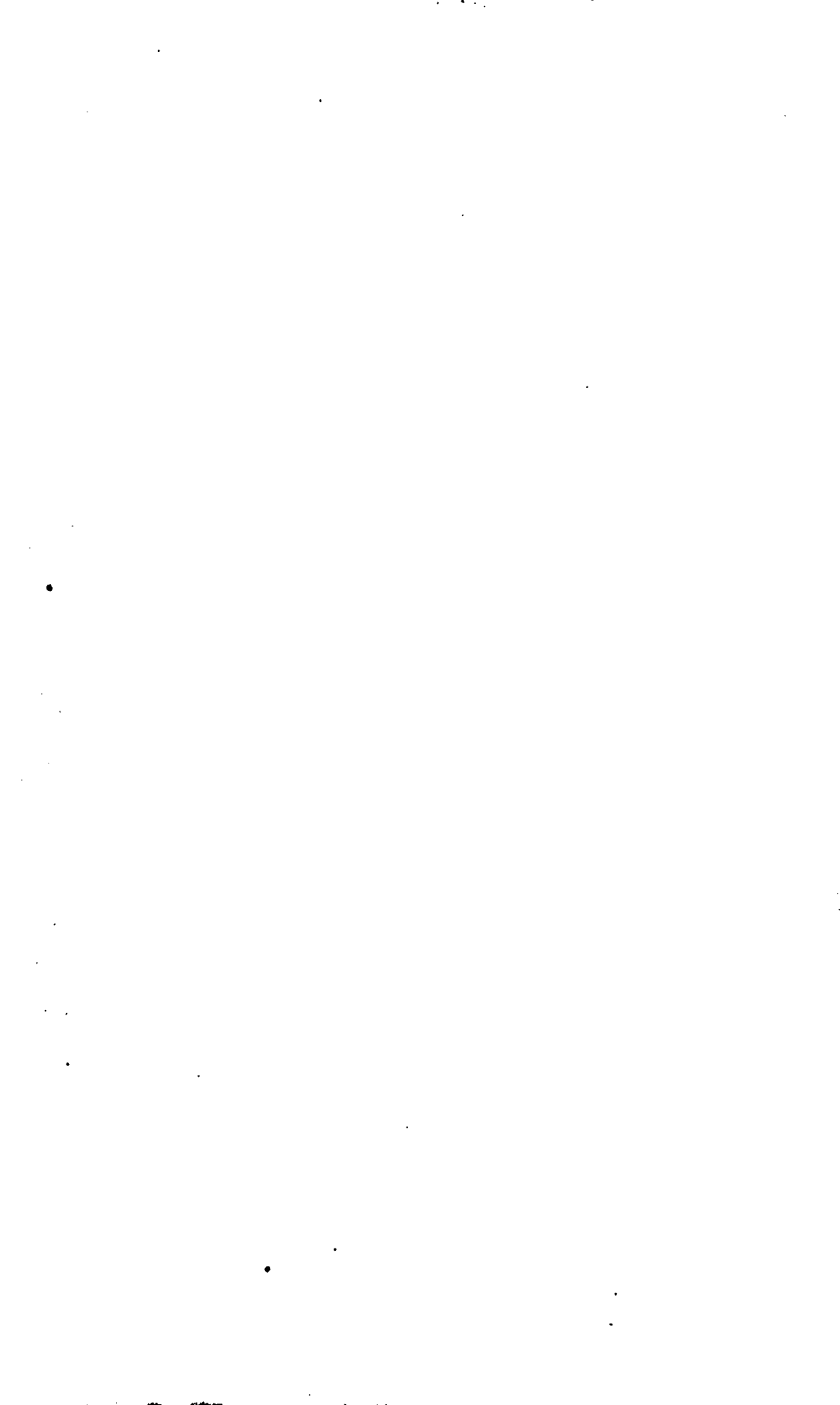
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Amos P. Treadwell









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**SIMONS' REPORTS.**

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**REPORTS**  
**OF**  
**C A S E S**  
**DECIDED IN THE**  
**HIGH COURT OF CHANCERY,**  
**BY**  
**THE RIGHT HON. SIR JOHN LEACH**  
**AND**  
**THE RIGHT HON. SIR ANTHONY HART,**  
**VICE-CHANCELLORS OF ENGLAND.**

---

**BY NICHOLAS SIMONS,**  
**OF LINCOLN'S INN, ESQ. BARRISTER AT LAW.**

---

**WITH NOTES AND REFERENCES,**  
**TO BOTH ENGLISH AND AMERICAN DECISIONS ;**  
**BY JOHN A. DUNLAP,**  
**COUNSELLOR AT LAW.**

**VOL. I.**  
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LORDS CHANCELLORS.

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MASTERS OF THE ROLLS.

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SIR J. LEACH,      SIR A. HART,  
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SOLICITORS GENERAL.

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CASES IN CHANCERY  
BEFORE  
THE VICE-CHANCELLOR.

The cases marked with an (\*) are reported *Ex Relatione*.

[\*1]                      \*PRATT V. BARKER.    PRETTY V. BARKER.

1826, 3d March.—*Fraud.—Practice.—Evidence.*

The court refused to set aside a voluntary deed executed by an old and infirm man in favor of a person who had attended him as a surgeon, and received the dividends of some stock for him; it appearing that the nature and effect of the deed were fully explained to the grantor, by his solicitor, before he executed it, and that no undue influence had been exercised over him.

If a bill is amended, by adding parties, after witnesses have been examined, their depositions cannot be read against the new parties.

THE plaintiff, Pratt, had formerly been a horse-dealer. At the time when he executed the deed after-mentioned, he was eighty years old, and subject to frequent attacks of the gout. The defendant, Barker, was a surgeon and apothecary, and, for thirteen years, had attended the plaintiff and also was often consulted by him respecting the management of his property: and, having received the dividends of some stock for a deceased sister of the plaintiff's, he, after her decease, received them for the plaintiff. The latter, being [\*2] much displeased at having to pay a large sum for probate and legacy duty upon his sister's effects, determined to dispose of his property in his lifetime; and, accordingly, Barker, by his desire, went to Mr. Sparling, a solicitor whom the plaintiff had before employed, and instructed him to prepare a declaration of trust of two sums of stock, the principal part of the plaintiff's property, by which, after the plaintiff's decease, certain specific portions of the stock were to be held in trust for different persons, and the residue, for the defendants, Barker and Osborne, who were to be the trustees.

The deed was accordingly prepared, and executed by the plaintiff on the evening of the 4th of December, 1820.

The bill alleged that the plaintiff, for some years before he executed the deed had been incapable, from age and infirmities, of managing his affairs: that Barker, in the course of his attendance upon the plaintiff, had acquired great influence over him: that the plaintiff, when he executed the deed, was ignorant

1826.—Pratt v. Barker.

of its contents, and believed, from Barker's representations, that he was making a testamentary, and not an irrevocable disposition of his property : and it prayed that the deed might be set aside, as having been fraudulently obtained by the defendants

Mr. Sparling, however, who was one of the witnesses in the cause, deposed that, notwithstanding the instructions he received from Barker, he left [\*3] blanks, in the ingrossment of the deed, for the names of the persons who were to take the residue ; and that when he attended the plaintiff with it for execution, the plaintiff desired him to fill up the blanks with the defendants' names. that he carefully read over and explained to the plaintiff, the nature and effect of the instrument, and particularly pointed out to him the distinction between it and a will : that the plaintiff fully understood the nature and effect of the deed, executed it voluntarily, and then gave it to Barker, and desired him to keep it.

The plaintiff Pratt having died pending the suit, it was revived by Pretty, his executor.

Mr. *Horne* and Mr. *Wilbraham*, for the plaintiff, commented on Pratt's age and infirmities, the confidential situation in which Barker had stood to him, and the influence he had acquired over him : on the improvidence of making an irrevocable disposition of the property : on Sparling having received his instructions from Barker, and having had no communication with Pratt, except late in the evening on which the deed was executed, and when Osborne and Barker were present : and they cited *Huguenin v. Baseley*, (a) and *Griffiths v. Robins*. (b)

Mr. *Heald*, Mr. *Shadwell*, and Mr. *Spence* appeared for the defendants Osborne and Barker, but were not required to argue the case.

[\*4] \*The VICE-CHANCELLOR :—In the case of *Huguenin v. Baseley*, the defendant was the confidential friend and adviser of Mrs. Huguenin, and was held bound to establish, not only that she executed the deeds of gift voluntarily, but with full knowledge of their nature, effect, and consequences. In *Griffiths v. Robins* the donor was eighty-four years of age, and nearly blind, and dependant upon the assistance of the defendant, who had married her niece : and I there held that, to maintain a gift under such circumstances, the defendant must establish by the intervention of a third person, that the gift proceeded from the free-will of the donor, and was fully understood by her. The defendant, in the present case, does not appear to have been the confidential friend and general adviser of the grantor, nor to have had any other influence with him than naturally followed from his long attendance upon the grantor as his surgeon, and from his services in receiving dividends for him at the bank, which before the death of the sister, he had been in the habit of receiving for her, as he occasionally came to London ; and the evidence of Mr. Sparling, who drew the deed, and who had before acted as the attorney of the grantor, establishes

1826.—*Davies v. Williams.*

the intervention of a third person, and the free-will of the grantor, and that he perfectly understood the difference between a deed and a will, with respect to the disposition of his property, and anxiously preferred the deed, in order that the legacy duty might be saved, which he had then lately reluctantly paid upon the death of his sister. Some of the evidence on the part of the plaintiff is entitled to very little credit.

Let the bill be dismissed with costs.[1]

\*Mr. Sugden, Mr. Pemberton, and Mr. Blackburn appeared for the [\*5] persons, to whom specific portions of the stock were given by the deed, and who were made parties to the suit, by amendment, after the evidence had been taken for the plaintiff; and, on the plaintiff's counsel beginning to read that evidence, submitted that it could not be read against their clients, as they were not parties when the witnesses were examined, and therefore had had no opportunity of cross-examining them; and the Vice-Chancellor so ruled.[2]

DAVIES V. WILLIAMS. (\*)

1826, 18th and 31st May.—*Pleading.—Supplemental bill.—Parties.—Demurrer.*

Where a plaintiff by the present practice of the court, may obtain that relief by petition, for which a supplemental bill was formerly necessary, and prefers the latter course, the supplemental bill is not demurrable, but the proceeding will be taken into consideration on the question of costs.

Where one executor has alone proved, he may sue without making the other executors parties, although they have not renounced.

A speaking demurrer is where a new fact is introduced which is necessary to support the demurrer.

THIS was a bill of revivor, in a creditor's suit, stating that, in 1823, George Davies, since deceased, had filed a supplemental bill against the defendants' Williams and others, praying that he might be at liberty to prosecute the origi-

[1] Affirmed 4 Russ. 507. See further, *Lord Selcay v. Rhodes*, 2 Sim. & Stu. 41, 55, and note *ibid.* *De Montmorency v. Devereux*, 1 Dru. & W. 119. *Earl of Winchelsea v. Garretty*, 1 Myl. & K. 253. A surgeon obtained an agreement from a patient, who was in his eighty-sixth year, stated to be in consideration for attendance for the remainder of his life and out of gratitude for past services, to pay 25,000*l.* after his death; a suit at law having been brought against the executor, the latter obtained an injunction which the Vice-Chancellor refused to dissolve; and on the final hearing before the Lord Chancellor, the agreement was ordered to be delivered up to be cancelled. *Dent v. Bennet*, 7 Sim. 539. S. C. 4 Myl. & Cr. 269. Where a confidential relationship exists, and one party is exposed to the arts and designs of the other, and a voluntary settlement or deed of gift is made, the policy of the law, requires the party claiming the benefit of such deed, or settlement to show affirmatively, that it proceeded from the donor's own free will, and was fully understood by him, and carried into effect by the intervention of some disinterested third person. Per Vice-Chancellor McCoun. *Simon v. Wilson*, 3 Edw. 39.

[2] An amendment making the plaintiffs in the original bill, sue on behalf of themselves, and all other persons having the same interest, does not so alter the parties or the frame of the record that depositions taken in the original suit, cannot be used in the amended suit. *Milligan v. Mitchell*, 3 Myl. & Cr. 72.



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 1826.—Davies v. Williams.
 

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nal suit against the defendants, and that it might be referred to the master to compute subsequent interest on his debt from the foot of the master's report of 28th July, 1815, and on the other debts mentioned in the report; and [\*6] that the master might take an account of sums received, by the \*defendants, in respect of the rents of certain leasehold property, and that what should be found due from them, might be applied, *pro rata*, towards the payment of the debt due to him and the other creditors.

The bill further stated that the defendants had appeared to that supplemental bill, but had not put in their answers to it; and that, before any further proceedings were had in the suit, George Davies died, having made his will, of which he appointed the present plaintiff, and two other persons, executors; but that the plaintiff had alone proved the will, power being reserved to the others to prove it, when they should apply: and the bill insisted that the plaintiff was entitled to have the suit revived and prosecuted against the defendants.

The other executors of G. Davies were not made parties to the bill.

The defendant Williams, put in a demurrer to this bill, in the following unusual form:—"This defendant by protestation, &c. And for causes of demurrer, sheweth that the said bill of revivor states no case, or no sufficient case in equity against this defendant, and that the said supplemental bill, referred to in in and by the said complainant's said bill, was an improper proceeding; and that George Davies, therein named, if he were entitled to any benefit or relief as against the parties defendants to the said supplemental bill, or any of [\*7] them, ought to have applied to this honorable court \*for the purposes for which such supplemental bill was exhibited, by petition, and not by supplemental bill; and that such supplemental suit is the only suit sought to be revived by the said bill of revivor; and that the said complainant hath, alone, filed the said bill of revivor, as the only legal personal representative of the said George Davies, deceased, although it appears by the said bill of revivor, that he, by his will, appointed John George and ——— Pearce, and the said complainant his, the said George Davies' executors: and the said bill of revivor states that power has been reserved to the said John George and ——— Pearce to prove such will, and does not state that they, or either of them, have or hath renounced or declined to prove: and which said George Davies and ——— Pearce are not parties to this suit. Wherefore, &c.

Mr. Knight for the demurrer insisted on the various objections to the bill which were pointed out in the demurrer.

Mr. Simpkinton for the bill, argued that it was a proper case for a supplemental bill; and objected that the demurrer was a speaking demurrer, and therefore bad.

The VICE-CHANCELLOR:—"The supplemental bill in this case is not rendered an irregular proceeding, because, by the present practice, the court would have enabled the plaintiff to prosecute the former decree without a new bill.

1826.—*Bromley v. Smith.*

This circumstance will be entitled to consideration upon the question of costs.[1]

\*Where one executor has alone proved, he may sue in equity, as well [\*8] as at law, without naming the others as parties.[2]

The argumentative part of the demurrer ought not to have been introduced : but it is mere surplusage, and does not render the demurrer a speaking demurrer. A speaking demurrer is, where a fact is introduced which is necessary to support the demurrer.

Demurrer overruled.[3]

BROMLEY v. SMITH.

1826, 3d June.—*Pleading.—Parties.—Attorney-General.*

A few of a large number of persons may institute a suit, on behalf of themselves and the rest, for relief against acts injurious to their common right, although the majority approve of those acts, and disapprove of the institution of the suit ; and the attorney general need not be a party to it ; but where the whole body concur in an abuse, the suit must be instituted by the attorney general.

By an act of parliament, passed in the 40th Geo. 3, for enclosing and allotting certain waste lands in the parish of Saint Mary, in Stafford, over which the householders, being parishioners within that borough, were entitled to rights of common, the occupiers of houses, of the yearly value of 5*l.* within the borough, or any seven or more of them were empowered to meet, at the times and places therein mentioned, for the purpose of making rules and regulations for the cultivation and management of the allotments, to appoint a treasurer and certain other officers, and to raise money by rates on such occupiers for the purpose of carrying the rules and regulations into effect.

\*This act was put in force soon after it was past. [\*9]

In 1821, one Bagnall, who had been removed, for misconduct, from an office which he held under the act, obtained a verdict, in an action for a libel brought against the defendant, Underwood, who was the then treasurer under the act, for damages and costs to the amount of 300*l.* In March, 1822, Underwood resigned the treasurership, and the other defendant, Smith, succeeded him. Smith, out of the money arising from the rates made pursuant to the act, paid 107*l.* 15*s.* 1*d.* to Underwood's attorney, in part discharge of the costs of the action.

[1] A party proceeding by bill, when he might have had the question settled on petition in a suit already pending is not entitled to costs. *De Lu Vergne v. Evertson*, 1 Paige, 181 ; and see *Wendell v. Wendell*, 3 Paige 509 ; 2 Sim. 478, note.

[2] Vide *Cramer v. Morton*, 2 Molloy, 108.

[3] Where one of the executors renounces the execution of the will, the other executors may file a bill in their own name, and if it is necessary to bring the executor who refused to accept the trust, before the court, he may be made a party defendant. *Thompson v. Graham*, 1 Paige, 284 ; as to speaking demurrer, see *Cawthorn v. Chalie*, 2 Sim. & Stu, 129. *Peed v. Cussen, Sausse & Scully*, 176. *Brooks v. Gibbons*, 4 Paige, 374.

1826.—*Bromley v. Smith.*

The bill was filed by nine persons, who were householders and parishioners within the borough of Stafford, on behalf of themselves and all other the householders being parishioners within the borough, except Smith and Underwood; and, after stating to the effect before mentioned, it alleged that the last-mentioned payment was a misapplication of the rates: that the householders being parishioners within the borough of Stafford, who were interested in the allotments, were very numerous, and that the plaintiffs were unable to make all of them parties to the suit. It prayed for an account of the rates received by the defendants during their respective treasurerships, and that the balance remaining in their hands might be applied for the purposes of the act; that they might be decreed to replace what they had misapplied, and be restrained from further misapplying the moneys arising from the rates.

Both the defendants stated in their answers that the action for a libel [\*10] arose out of acts done by \*Underwood, in obedience to orders made by the householders present at certain meetings; and that the costs of the action also had been paid out of the rates in obedience to orders made in like manner, and had been allowed to the treasurer in passing his accounts; and that the majority of the householders were averse to the institution of this suit, and approved of the acts complained of in the bill. These statements were supported by evidence.

Mr. Hart and Mr. Ludlow for the plaintiffs contended that the householders had no discretionary power as to the application of the rates: that they could apply them to no other purposes than those prescribed by the act: that, by the misapplication complained of in the bill, all the householders were injured, as more money must necessarily be collected from them than would have been required for the purposes of the act, and that therefore any of them had a right to seek redress for the injury they had sustained.

Mr. Shadwell and Mr. Piddock for the defendants relied on the proceedings complained of having been sanctioned by the majority of the householders; and insisted that the plaintiffs had no right to institute this suit against the wishes of that majority; and that if there had been any abuse, the only mode of redressing it was an information filed by the attorney general.

The VICE-CHANCELLOR:—Where a matter is necessarily injurious [\*11] to the common right, the majority of the persons interested can \*neither excuse the wrong, nor deprive all other parties of their remedy by suit.

The attorney general may file an information, in a case like this, in respect of the public nature of the right; and the proceeding must be by the attorney general where all persons interested are parties to the abuse; but where that is not the case, I am not aware of any principle or authority which makes it necessary that he should be before the court.(a) [1]

(a) See *Meux v. Maltby*, 2 Swans. 277.

[1] Vide *Gray v. Chaplin*, 2 Sim. & Stu. 267; *Jones v. Garcia del Rio*, Turn. & Russ. 297; *Story's Eq. Plead.* 117; *Walburn v. Ingilby*, 1 Myl. & K. 61; *Blain v. Agar*, post 37, S. C. 2 Sim. 289.

1826.—*De Tastet v. Lopez.*

DE TASTET V. LOPEZ.

1826, 6th July.—*Practice.—Attachment.—Answer.*

Exceptions to an answer having been allowed, plaintiff obtained an order to amend, and for defendant to answer the exceptions and amendments at the same time; defendant put in an answer to the amended bill only. The plaintiff then issued an attachment: held, that it was irregular, and that plaintiff ought to have moved to take the second answer off the file.

THE plaintiff filed a supplemental bill, to which the defendant put in an answer which was excepted to; and the master allowed the exceptions. The plaintiff then obtained an order to amend his supplemental bill, and for the defendant to answer the amendments and exceptions at the same time. The defendant put in an answer to the amendments and exceptions. The plaintiff excepted to the answer to the amendments, and referred the answer back upon the old exceptions. The master allowed the exceptions to the amendments and also the old exceptions; upon which the plaintiff obtained a second order to amend his supplemental bill, and for the defendant to answer the further amendments and exceptions to the amended bill, and the \*old [\*12] exceptions at the same time. The defendant then put in an answer, which was intituled, and was in fact, an answer to the amended supplemental bill only, and was not intituled, and was not a further answer to the original supplemental bill. The plaintiff then sealed an attachment for want of an answer to the supplemental bill.

Mr. Hart and Mr. Wakefield, for the defendant, now moved to discharge the attachment, and contended that it had issued irregularly, because the plaintiff ought to have moved to take the last answer off the file, as not being an answer according to the order and the practice of the court.

Mr. Pepys, for the plaintiff, opposed the motion.

THE VICE-CHANCELLOR:—This attachment is irregular. The plaintiff should either have moved to take the last answer off the file, as the title of the answer does not correspond with the order: or if, for any reason, he desired to keep the last answer on the file, he ought to have moved, specially, for permission to issue an attachment, in order to enforce an answer to the exceptions to the original and supplemental bill.[1]

[1] The titles to further answers must correspond with the orders under which they were put in. *The Bennington Iron Company v. Campbell*, 2 Paige 160. "Where exceptions to a former answer and amendments to the bill are answered together, if neither the amendments nor exceptions are fully answered, the complainant is only at liberty to file new exceptions founded on the new matters introduced into the bill by such amendments. The answers will then be referred on the new exceptions, and upon such of the old exceptions as are specified in the order of reference, agreeably to the fifty-second rule. In such cases the complainant must wait until the new exceptions are filed, and then refer both together in the same order, if the new exceptions are not submitted to, within the eight days allowed for that purpose. Where the new exceptions are submitted to, the answer must be referred on the old exceptions, or some of them, within ten days thereafter, or it will be deemed sufficient. New exceptions for insufficiency cannot be taken to the further answer, founded upon the matter of the original bill only. And where the reference is on

1826—*Scott v. Hanson.*

[\*13]

\*SCOTT v. HANSON.

1826, 22d July; 14th August.—*Vendor and purchaser.—Misrepresentation.*

A piece of land, imperfectly watered, was described in the particular as uncommonly rich water meadow: held that this was not such a misrepresentation as would avoid the sale.

AN estate, sold by auction, was described, in the particulars of the sale, as consisting of fourteen acres of uncommonly rich water meadow land, let on lease with other land for a term of which four years were unexpired; and it was then stated that the apportioned rent for this lot was 75*l*.

A suit having been instituted by the vendor for a specific performance of the contract, it appeared in evidence, that, on account of the high level of this meadow and the low level of some adjoining land, the former was imperfectly watered. It was objected, for the purchaser, that it was not proved to be a water meadow. But the Vice-Chancellor, ruling that a meadow which was watered, though imperfectly, was not improperly described as a water meadow, it was then insisted that to describe it, in the particular, as uncommonly rich water meadow land, was a misrepresentation; and that a court of equity ought not to assist the vendor, but should leave him to his action at law.

For the vendor it was argued that the principles as to representation were the same in equity as at law: that the real quality of this land, being an object of sense, and obvious to ordinary diligence, it was the fault of the purchaser if he did not inspect it and judge for himself: that, the amount of the annual rent being stated, which was the criterion of the value, the purchaser [\*14] could not be deceived: that when the land was \*said to be *uncommonly* rich, it was spoken of comparatively only; and that the question throughout the cause had been, not whether the land was uncommonly rich water meadow, but whether it was water meadow at all.

The cases cited for the plaintiff were *Fenton v. Browne*,(a) and *Trower v. Newcome*.(b)

The Vice-Chancellor took time to consider the case, and then gave judgment to the following effect:—I do not accede to the argument that the principles upon the subject of representation are uniformly the same in equity as at law: for, in the case of *Stewart v. Allison*,(c) Lord Eldon, C. states the doctrine of the court to be otherwise. In a bill for a specific performance it is not sufficient to say that the purchaser has been negligent, if the vendor, who seeks the aid of a court of equity, has, in his conduct, been incorrect. I agree with Sir William Grant, M. R.; in the case of *Trower v. Newcome*,

the new exceptions alone, the master is not at liberty to inquire whether the old exceptions are fully answered, or whether any part of the original bill to which the old exceptions did not relate was answered by the first answer of the defendant thereto." Walworth, Ch. *ibid*. See further *Sayle v. Graham*, 5 Sim. 8.

(a) 14 Ves. 144.

(b) 3 Mer. 704.

(c) 1 Mer. 26.

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1826.—*Vicary v. Widger.*

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that a representation which is vague and indefinite is to be treated, by a purchaser, only as a ground for inquiry; and the doubt in that case is whether the purchaser was not justified in concluding that the representation amounted to a statement that the incumbent was eighty-two years of age. Unless the expression, used in this case, can be considered as a representation that the land in question was not imperfectly, but perfectly watered, then the expression is vague and indefinite; and, upon the best consideration I can give this case, I think I should strain the meaning of the words "uncommonly rich \*water meadow land," if I were not to confine the meaning to the [\*15] quality of the land, and, in that sense, it professes to be nothing more than the loose opinion of the auctioneer, or vendor, as to the obvious quality of the land, upon which the vendee ought not to have placed, and cannot be considered to have placed any reliance. I lay no stress upon the circumstance that a rent of the land is mentioned in the particular of sale; because it is not a rent fixed by contract with the lessee, but a part of a gross rent, paid for the land in question and other premises comprised in the same lease; and is arbitrarily apportioned by the vendor. The purchaser must therefore complete his contract.[1]

Mr. *Sudgen* and Mr. *Jacob* appeared for the plaintiff.

Mr. *Heald* and Mr. *Girdlestone* for the defendant.

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VICARY V. WIDGER. (\*)

1826, 7th July.—*Injunction.—Interpleader.—Practice.*

The plaintiff in a bill of interpleader may move at once for a special injunction on payment of the money into court, without first obtaining the common injunction.

THIS was a bill of interpleader.

The plaintiff obtained the common injunction for want of an answer, and, afterwards obtained a special injunction to stay all proceedings, upon payment of the money in dispute into court.

\*One of the defendants put in his answer and obtained an order, *nisi*, [\*16] to dissolve the injunction.

The defendant now moved to make the order *nisi*, absolute.

Mr. *Knight* for the plaintiff.

The VICE-CHANCELLOR:—The common injunction, as the practice is now settled, was a superfluous proceeding on the part of the plaintiff; but, an order to dissolve it, would be a useless expense, as it would leave the special injunction in force.

[1] Vide *Smith v. Richards*, 13 Peters, 26. *Pike v. Vigers*, 2 Dru. & W. 251. *Fellows v. Lord Gwydyr*, post, 32. Amer. Chan. Dig. Agreement, VI. VIII. *Bacon v. Bronson*, 7 Johns. Ch. Rep. 301. 1 Story's Eq. 213. *Barraud v. Archer*, 2 Sim. 433.

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1826.—David v. Williams.

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I once thought it might be useful, never to grant the special injunction, upon an interpleading bill, unless the plaintiff had first obtained the common injunction. And my reason was, that it would compel the interpleading plaintiff to have recourse to this court, in an early stage of the proceedings at law, and before much expense was incurred there ; instead of leaving him at liberty to file his bill the day before the trial, and after all the expense was incurred at law. But a subsequent case, before the Lord Chancellor, has settled the practice otherwise.[1]

[\*17]

\*DAVID v. WILLIAMS. (\*)

1826, 14th and 24th July.—*Practice*.—*Exception*.

An exception may be regularly filed to the master's report as to impertinence after the order to expunge, and at any time before the impertinent matter is actually expunged.

THE master having reported the answer impertinent, the defendant, on the 10th of May, filed exceptions to the report, and, on the 11th, obtained an order to set down the exceptions. He set them down accordingly, and, on the same day, obtained a certificate of having so done ; and, on the 13th, served the plaintiff with the order and certificate.

On the 11th of May, the plaintiff had taken out a warrant to expunge the impertinence and tax the costs, and attended upon that warrant. On the 13th, but after the plaintiff was served with the order and certificate, the impertinence was expunged. The plaintiff then sued out a subpœna for the costs, and issued an attachment against the defendant. The defendant now moved to discharge the attachment for irregularity, with costs.

Mr. Knight, for the motion, cited *Norway v. Rowe*,(a) and said that the plaintiff had no right to expunge the impertinence, after an exception had been regularly set down : and that an exception might be regularly filed, at any time before the order to expunge was actually executed.

Mr. Horne and Mr. Roots, contra, contended that, after the order to expunge was regularly made and drawn up, it was too late to file an exception ; and that the order to expunge had been properly acted upon, and the attachment regularly issued.

The case was ordered to stand over that the registrar might inquire into the practice.

(a) 1 Mer. 135.

[1] By the common order for an injunction in an interpleading suit, the injunction is directed to issue upon bringing the fund in question into court ; and if without the special direction of the court, the order is so drawn up that it does not make the bringing the fund into court a condition precedent to the issuing of the injunction, the order will be discharged for irregularity. *Sieeking v. Behrens*, 2 Mylne & Craig, 581 ; where Lord Cottenham intimates that bills of interpleader ought not to be encouraged.

1826.—*Onslow v. Onslow.*

24th July.—The VICE-CHANCELLOR :—The question is whether the plaintiff has been regular in his proceeding. Upon inquiry into the practice, I find that the plaintiff is irregular, and that the defendant is at liberty to except to the master's report of impertinence after the order to expunge, and at any time before any proceeding on that order.[1]

ONSLow v. ONSLOW. (\*)

1826, 28th January and 13th July.—*Custom of London.*—Widow.

The personal estate of an honorary freeman of the city of London, is in case of his dying intestate distributable according to the custom of London ; and his widow is not barred of her customary share by a settlement which is expressed to be in lieu of all dower, or thirds or other portion at common law or otherwise, out of his freehold and copyhold lands.

THIS bill was filed, by the surviving trustee under the marriage settlement of the late Sir Francis Samuel Drake, praying that the rights and interests of the defendants in the sum of 7,500*l.* three per cent. consols, and in certain furniture and effects included in the settlement, might be ascertained and declared by the decree of the court.

In 1782, in consequence of Lord Rodney's victory, Sir Francis Samuel Drake, who was an admiral in the royal navy, was presented with the freedom of the \*city of London ; and, on the 5th of August, 1784, was [\*19] made a liveryman of the grocer's company, and took the oaths.

By the settlement on the marriage of Sir Francis Samuel Drake with Miss Pooley Onslow, dated the 21st and 22d of January, 1789, it was witnessed that, "for making a competent jointure for the said Pooley Onslow, in case she should survive the said Sir F. S. Drake, in bar of dower, and for making a provision for the children or issue of the marriage," certain real estates of Sir Francis Samuel Drake were conveyed to trustees, to the use of Sir F. S. Drake, and his assigns, for his life ; with remainder to Miss Onslow, and her assigns, for her life ; and it was declared that a sum of 15,000*l.* three per cent. consols, which Sir F. S. Drake had transferred to the same trustees, should be held by them upon trust to permit Sir F. S. Drake, or his assigns, to receive the dividends during his life, and in case his intended wife should survive him, upon trust to permit her and her assigns to receive the dividends for her own use for her life ; and the settlement contained divers limitations over, as well of the real estates as of the stock, in favor of children of the marriage, with an ultimate limitation, in default of issue of the marriage, to Sir F. S. Drake, his heirs, execu-

[1] A party may take exceptions to the master's report of impertinence, at any time before the impertinent matter is actually expunged. *Evans v. Owens*, 2 Myl. & K. 332. But by taking proceedings to expunge, the party adopts the report altogether, and cannot afterwards unless by the special leave of the court take exceptions to the report as to passages reported pertinent. *Holmes v. Corporation of Arundel*, 3 Beav. 303.



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 1826.—Onslow v. Onslow.
 

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tors, administrators and assigns ; and it also contained the following declaration :

" It is expressly declared and agreed that the provision and settlement, hereinbefore made for the said Pooley Onslow, in case she happen to [\*20] survive the said Sir Francis Samuel Drake, is, or is intended, \*or hereby declared to be, and shall and is, at all times hereafter, to be construed, deemed and taken to be in lieu, full satisfaction and bar of all dower or thirds, or other portion, at common law or otherwise, which she the said Pooley Onslow, can, shall or may, have, claim or demand out of all or any part of the freehold or copyhold lands, hereditaments and premises of the said Sir Francis Samuel Drake."

In 1789, Sir Francis Samuel Drake died intestate, and without issue of the marriage, leaving dame Pooley Drake, his widow, surviving. By the death and intestacy of Sir F. S. Drake, his widow became entitled to a moiety of the 15,000*l.* three per cent. consols ; which was accordingly transferred to her. The other moiety continued invested in the name of the plaintiff, upon the trusts of the settlement ; and the dividends were duly paid to the widow, and, on her marrying again, to her second husband, till 1822, when she died. Her second husband, Mr. Serjeant Onslow, who was one of the defendants to this suit, insisted that Sir Francis Samuel Drake having been, at the time of the settlement and till his death, a freeman of the city of London, his widow was not barred of her rights by the custom of the city, to the personal estate of her late husband ; and that, in the events which had happened, she was entitled by such custom to one half of the personal estate of Sir F. S. Drake, at the time of his death, and to one half part of the remaining half of such personal estate, under the statute of distributions ; and, therefore, required the plaintiff to transfer to him one half part of the 7,500*l.* three per cent. consols.

[\*21] \*The other defendant was the personal representative of Sir F. S. Drake, who insisted that by the provisions of the settlement the widow was barred of all right by the custom of London.

When the cause came on to be heard on the 26th of January, 1826, it was made a question whether honorary freemen were subject to the custom of London as to the distribution of their estate in the case of intestacy. The Vice-Chancellor, therefore, ordered that the cause should stand over ; "and that the lord mayor and aldermen of the city of London do certify the custom of the said city, by the mouth of the recorder of the said city, on the following points, namely :

" *First*, whether Sir F. S. Drake, the intestate in the pleadings of this cause named, and who was not free of the said city by birth, or by servitude, or by purchase, or otherwise than as aforesaid, was, at the time, a freeman of the city of London, in the sense, meaning and operation of the custom of the said city, relating to the distribution of the effects of freemen who die intestate ?

" *And*, in case the custom of the city of London as to the distribution of

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1826.—Cockerell v. Barber.

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the personal estate applied to such a freeman as the said Sir F. S. Drake was ; then,

“*Secondly*, whether there is any custom of the city of London, by virtue whereof the widow of a freeman, having the benefit and provision of such a settlement as the settlement in the pleadings in this cause stated, is debarred from her customary share of his personal estate ?”

\*On the 13th of July, 1826, the mayor and aldermen of the city of [\*22] London, by word of mouth of the recorder, who appeared in court for that purpose, certified as follows :—“ We, the said mayor and aldermen of the said city, by Newman Nnowlys, esq. the recorder of the city, by word of mouth of the said recorder, according to the custom of the said city, do, in obedience to the annexed order, humbly certify that Sir F. S. Drake was, at the time of his death, a freeman of the city of London, in the sense, meaning and operation of the custom of the said city, relating to the distribution of the effects of freemen who die intestate ; and we further certify, in like manner, by the mouth of the said recorder, that there is not any custom of the city of London by virtue whereof the widow, having the benefit and provision of the settlement in the pleadings in the said cause stated, is debarred from her customary share of the intestate’s personal estate.”

And the recorder then, for the better certainty of the court, delivered in a written certificate to the same effect ; which was signed by the lord mayor and twelve aldermen.

Mr. *Wakefield*, for the plaintiff.

Mr. *Horne*, and Mr. *Daniel*, for the personal representative of Sir F. S. Drake.

Mr. *Hart*, Mr. *Shadwell*, Mr. *Sugden* and Mr. *Ellison*, for Mr. Serjeant Onslow.

\*The following cases were mentioned :—*Pott v. Lee*, (a) *Lewin v. Lewin*, (b) *Atkins v. Waterson*, (c) *Babington v. Greenwood*. (d) [\*23]

The Vice-Chancellor decreed according to the effect of the certificate.

Reg. Lib. 1825. B. f. 1582.

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COCKERELL v. BARBER. (\*)

1826, 5th July ; 1st August.—*Executor*.

An executor in India is entitled to a commission of 5 per cent. on all assets of a testator collected by him there, including the assets which he retains in respect of a legacy to himself not given to him in the character of executor, and including moneys belonging to the testator, which were in the hands of a commercial house in which the executor was, and the testator had been a partner. *Semble*.

(a) 1 Eq. Abr. 157.

(b) 3 P. W. 15.

(c) 1 Eq. Abr. 159.

(d) 1 P. W. 530. Pre. Cha. 505.

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1826.—Cockerell v. Barber.

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CHARLES BARBER, by his will, gave to his friend and partner, John Palmer, 100,000 sicca rupees, to be paid as soon as conveniently could be after his death, and appointed Palmer his executor. By a codicil he gave to Palmer, whom he described as the executor named in his will, 200,000 sicca rupees in addition to the 100,000 rupees.

The master's report stated that Mr. Palmer had retained the 100,000 sicca rupees, out of assets come to his hands, and that a balance was due to him in respect of the 200,000 sicca rupees. It also appeared, by the report, that Mr. Palmer, or some person for his use had received, on account of the testator's personal estate not specifically bequeathed, 407,492 sicca rupees, and had thereout paid 376,178 like rupees, which he was allowed by the master.

Mr. Palmer also claimed, before the master, 20,374 sicca rupees, being [\*24] a commission, at the rate of 5 per cent., for collecting the \*estate of the testator; and, the master having disallowed the claim, he excepted to the report.

On the 29th of June, 1818, the exception was heard, and the Vice-Chancellor referred it back to the master to inquire whether, according to the course of the court in India, an executor, who is also a legatee, has a right to charge commission.

On the 23d of June, 1821, on a re-hearing of the exception, the Vice-Chancellor ordered that it should be referred to the master to inquire whether, according to the course of the court in India, an executor, who is also a legatee, but having his legacy not given to him in the character of executor in India, is entitled to commission, at the rate of 5 per cent. for collecting the estate of a testator in India; and, in case the master should find that, according to the usage in India, such executor and legatee is entitled to such commission, then that the master should inquire and state to the court whether Palmer was entitled to such commission, upon the receipt of such part of the testator's estate as was necessary for the payment of his legacies, or any and which of them; and also whether he was entitled to such commission in respect of so much of the testator's estate as, at the time of the testator's death, consisted of money or securities for money in the hands of Palmer, and his co-partners in trade in India, of whom the testator was one, or any or either of them, with liberty to the master to state any special circumstances.

The master, by his report, made pursuant of this order, stated that a case and the opinion of Mr. Serjeant Spankie\* thereon had, amongst other [\*25] documents, \*been laid before him, and that the solicitors for all parties had agreed to his receiving this case and opinion in evidence; and that, upon considering the several matters referred to him, and what had been laid before him, he was of opinion, and therefore found that, according to the course of the court in India, and the usage there, an executor, who was also a legatee, but not having his legacy given to him in the character of executor in India,

\* Late Advocate-General at Calcutta.

1826.—Cockerell v. Barber.

was entitled to a commission, at the rate of five per cent., for collecting the estate of a testator in India; and that he was so entitled on all sums collected and received by him, and with which he was chargeable in his account of assets, without distinction as to the same being necessary for the payment of legacies or debts, or otherwise, and without regard to the circumstance, when it occurred, that such assets had arisen from debts due to the testator by a mercantile house in which the executor himself was a partner and liable as such; and the master therefore found that the defendant, John Palmer, was in like manner entitled, according to the course of the court in India, and the usage there, to such commission upon the receipt of such part of the testator's estate, as was necessary for the payment of his legacies or any of them; and that he was entitled to such commission in respect of so much of the testator's estate, as at the time of his death consisted of money or securities for money, in the hands of Palmer and his co-partners in trade in India, of which the testator was one, or any or either of them.

A petition, by Mr. Palmer, to have the report confirmed, and a cross-petition, by other defendants, praying that the report might not be confirmed, and that it \*might be declared that Palmer was not entitled to [\*26] the commission, now came on to be heard.

Mr. Sugden and Mr. Rose, in support of the cross-petition:—It seems clear that the legacies, in this case, were given to Mr. Palmer, in his character of executor. *Read v. Devaynes*.(a) In that case the Master of the Rolls said, "Wherever the appointment and the legacy are contained in the same will, the executor must prove, or he shall not have the legacy." *Stackpool v. Howel*(b) and *Dix v. Reed*(c) are to the same effect; and the rule is clear, *prima facie*, against executors, who must show particular circumstances in the case, to prevent the construction that the legacy is annexed to the office. In the present case, the legacy is in the same will; and, when a further legacy is given by the codicil, the testator describes the legatee as his executor. It is, therefore, clear that, if Mr. Palmer had not proved the will and acted as executor in collecting the assets, he would not have been entitled to the legacy. *Freeman v. Fairlie*(d) decides that, if an executor has a legacy given for his trouble in the execution of the trusts of the will, he is not entitled to a commission on his receipts or payments.

Mr. Hart, for other parties in the same interest:—If the principle which the master has adopted is to prevail, then, if an executor is legatee of nineteen-twentieth \*parts of a testator's estates, he is also to take the [\*27] remaining twentieth, for his own benefit, in the shape of commission.

Mr. Pepys for Mr. Palmer:—It is true there were some strong opinions stated by the Master of the Rolls in *Read v. Devaynes*, but these opinions were not acted upon; for, as the executor there had proved the will, a decision according to the opinions expressed, was unnecessary. But Mr. Mitford, now

(a) 3 Bro. C. C. 95, and S. C. 2 Cox. 285

(b) 13 Ves. 417.

(c) 1 Sim. &amp; Stu. 237.

(d) 3 Mer. 24.

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 1826.—*Napier v. Napier*.
 

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Lord Redesdale, who was one of the counsel in that case, seems to have been startled by the doctrine laid down by the Master of the Rolls. It is plain that what was laid down in *Stackpoole v. Howell* and *Dix v. Reed* is the true principle; and that, where there is no more than an appointment of executor, and a legacy to the person so appointed, the gift is annexed to the office. But, in this case, there are, in other parts of the will, which are not stated in the petitions before the court, other motives mentioned for the legacy. And, if the legacy given by the will, is not annexed to the office, it is clear that the legacy in the codicil is not so annexed; and, although Mr. Palmer is mentioned in the codicil as executor, the word executor is there introduced merely as an additional description of the individual.

The Vice-Chancellor ordered the master's report to be confirmed, and allowed the commission to be retained by Mr. Palmer.[1]

"This court doth, in both petitions, order that the said master's [\*28] report, dated the 19th day of July, 1826, \*be confirmed: and this court doth declare that the petitioner, John Palmer, is entitled to be allowed, on passing his accounts before the master in this cause, commission, after the rate of five pounds per cent, upon all the assets of the testator, Charles Barber, collected and received, or to be collected and received by him in India, without distinction as to the same being necessary for the payment of legacies and debts, or otherwise, and without regard to the circumstance, whether such assets have arisen from debts due to the testator from, or consisting of money in the hands of the petitioner and his partners in trade in India, of which the testator was one or any or either of them. And it is ordered, that all parties be paid their costs of these applications, to be taxed by the master out of the testator's residuary estate.

Reg. Lib. A. 1825, f. 1845.

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#### NAPIER v. NAPIER. (\*)

1826, 21st and 22d July, and 14th August.—*Power*.—*Devise*.

A testator makes a general devise of all his lands in nine parishes; in five of them he had only land in fee; in three others he had only lands over which he had a power of appointment; in the other he had lands in fee, and also lands over which his power extended: all the lands pass by his will except the lands in the latter parish which were subject to his power.

On the hearing of an exception to the master's report in this cause, the question was, whether the will of Edward Berkeley Napier operated, as to a

[1] Affirmed, 2 Russ. 583. Where the judgment of the Vice-Chancellor is given at length. See further *Morris v. Kent*, 2 Edw. 175. *Dix v. Reed*, 1 Sim. & Stu. 239 and note, *ibid.* *Piggott v. Green*, 6 Sim. 72.

1826.—*Napier v. Napier.*

certain estate, as an execution of a power reserved to him by his marriage settlement.

The suit was instituted, by the infant grandson of the testator Edward Berkeley Napier, for the execution \*of the trusts of the will of his father [\*29] Gerard M. B. Napier. Under the proceedings in the cause, certain estates were directed to be sold. When the abstract of title was delivered to one of the purchasers, the question as to the execution of the power was raised; and, on a motion to compel the purchaser to pay his purchase money into court, it was referred to the master to inquire whether the will was an execution of the power, as to part of the estates. The master having reported in the affirmative, the purchaser excepted to the report.

The question arose under the following circumstances: By indentures of lease and release, dated the 27th and 28th of May, 1790, being the settlement on the marriage of Edward Berkeley Napier, esquire, with Sarah Martin, certain messuages, lands and other hereditaments, in the parishes of Lamyat and East-Pennard in Somersetshire, were conveyed to the use (after the marriage) of Edward Berkeley Napier, and his assigns, for his life, without impeachment of waste, with remainder to the use of trustees and their heirs during his life upon trust to preserve contingent remainders, with remainder to the use of Sarah Martin, and her assigns, for her life, with remainder to the use of such child, or such one or more of the children of Edward Berkeley Napier and Sarah Martin, and for and during such estate or estates, interest or interests, and in such parts, shares or proportions, and manner and form, and with and under such restrictions, limitations over, charge and charges for the benefit of the same children, or some or one of them, or without any restriction, limitation over, or charge, as Edward \*Berkeley Napier, at [\*30] any times thereafter, in or by any deed or deeds, writing or writings, with or without power of revocation and new appointment, to be by him sealed and delivered in the presence of and attested by two or more credible witnesses, or in and by his last will and testament in writing, or any codicil thereto, to be by him signed and published in the presence of and attested by three or more credible witnesses, should nominate, limit, direct or appoint, and, for want of such nomination, limitation, direction or appointment, to the use of all and every the child and children of Edward Berkeley Napier and Sarah Martin, equally to be divided between them (if more than one) as tenants in common in tail, with cross-remainders between or amongst them in tail, with remainder to the use of the right heirs of Edward Berkeley Napier for ever.

There was issue of the marriage two children, Gerard Martin Berkeley Napier, and Letitia Sarah Napier.

Sarah Napier, formerly Sarah Martin, the wife of Edward Berkeley Napier, died in his life-time, and before the date and execution of his will.

Edward Berkeley Napier was also, at the time of making his will, seised of eleven acres of land, or thereabouts, situate in the parish of Lamyat, and which had been purchased by him since the date and execution of the settle-

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ment, and consequently were not included therein. He afterwards made his will, dated the 8th of June, 1799, and duly executed by him, and attest-  
 [\*31] ed in the manner required by the \*settlement and by the statute of frauds for the devise of freehold estates of inheritance, and, after bequeathing a legacy of 10,000*l.* to his daughter Letitia Sarah Napier, to be paid to her on her attaining the age of twenty-one years, or day of marriage, which should first happen, he proceeded in the following manner :—" I give, devise, limit and bequeath unto my son Gerard Martin Berkeley Napier, his heirs, executors, administrators and assigns, all and singular my manors, messuages, lands, tenements and hereditaments, situate, lying and being in the several and respective parishes of Martock, Tintenhall, Ivelchester, Sock Dennis, Lamyat, Diteheal, Bruham, Burton and East-Pennard, or elsewhere within the said county of Somerset, and every part and parcel thereof, to hold the same premises, with their rights, members and appurtenances, unto and to the use of my said son Gerard Martin Berkeley Napier, his heirs, executors, administrators and assigns, according to the nature of the said estates respectively ; but, in case my said son shall happen to die before he shall attain the age of twenty-one years, without leaving lawful issue of his body living, or *in ventre sa mere* at the time of his decease, which shall afterwards be born alive, then I give, devise, limit and bequeath the same manors, messuages, lands, tenements, hereditaments and premises, and every part and parcel thereof, unto and to the use of my said daughter Letitia Sarah Napier, her heirs, executors, administrators and assigns, according to the nature of the said estates respectively ; but in case my said daughter shall happen to die before she shall attain the said age of twenty-one years, and without leaving lawful issue of her body living  
 [\*32] at the \*time of her decease, then I give, devise and bequeath unto my relations, John Berkeley Burland, esquire, Henry Berkeley Portman, esquire, Edward Berkeley Portman, esquire, Thomas Berkeley Troyte, esquire, and the Reverend Edward Berkeley Troyte, L. L. D., sons of my aunt, Mrs. Arundel Troyte, and Charles Knatchbull, of Babington, in the said county of Somerset, esquire, all and singular the said manors, messuages, lands, tenements, hereditaments and premises, and every part and parcel thereof, with their rights, royalties, privileges, advantages, emoluments, hereditaments and appurtenances, to hold the same premises, with their rights, members and appurtenances, unto the said John Berkeley Burland, Henry Berkeley Portman, Edward Berkeley Portman, Thomas Berkeley Troyte, Edward Berkeley Troyte, and Charles Knatchbull, their heirs, executors and administrators, to, for and upon the several uses, trusts, intents and purposes, and subject to the provisoes and declarations hereinafter expressed and contained of and concerning the same (that is to say,) to the only proper use and and behoof of Letitia Napier, my mother, and her assigns, for and during the term, of her natural life," with divers remainders over.

In a subsequent part of the will, the testator directed his executors to take care of certain title deeds in his dwelling-house, and, amongst others enumera-

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ted, "also Mrs. Martin's marriage settlement, under which she has only an interest for her life in an estate at Lamyat, a copy of which settlement will be found among the title deeds of my Lamyat estate."

\*Mr. *Preston* in support of the exception:—This will is not an execution of the power as to the settled lands in Lamyat. [\*33]

1st. It has no reference to the power of appointment. The words used in it are "I give, devise, limit and bequeath," and, of these, the word "limit" is the only one that can be considered as in any degree referable to a power.

In order to make a valid execution of a power, there must be a description of the property, or a reference to the power, or something to show an unequivocal intention to execute the power. The law has been accurately laid down on this subject, in the recent case of *Doe v. Roake*,<sup>(a)</sup> where it is said: "No terms, however comprehensive, although sufficient to pass every species of property, freehold and copyhold, real and personal, will execute a power, unless they demonstrate that the testator had the power in his contemplation and intended to execute it." In this respect, cases on the execution of powers proceed on exactly the same doctrine as cases of election. Where a party is put to his election, it must be clearly shown that there was an intention to affect the property.

As to the reference to the settlement in the latter part of the will, it is plain that it was without any reference to the contents of the settlement, which is merely mentioned as one among a number of deeds in a particular house.

\*2d. The limitations over are in favor of persons who are not objects [\*34] of the power.

Mr. *Sugden* for the plaintiff:—It was settled in *Blunt v. Clitherow*,<sup>(b)</sup> following the two cases before Lord Hardwicke, which are referred to by the master of the rolls, that, in order to raise a case of election against the heir, a general devise of all copyholds included, not only those surrendered to the uses of the will, but such as had not been so surrendered. There are, however, few authorities directly applicable to this case. In *Lewis v. Lewellyn*,<sup>(c)</sup> the question was, whether a power was exercised, as to copyhold, by a general devise of all freehold and copyhold estates; and the court held that the copyhold passed by the will as an execution of the power. But the question, in that case, whether the freehold passed, seems (what is extraordinary) never to have been raised: so that the court gave no opinion upon it. The present case is a much stronger one, in favor of the execution, than *Doe v. Roake*.<sup>(d)</sup> In that case it was argued that the same words could not operate, at the same time, as words of conveyance and as the execution of a power; but the judges held that they might so operate, and they relied upon the direction to keep the estate in repair. That was certainly not a strong circumstance; but it shows that the court will lay hold of any circumstance, although slight, which supports the execution of the power. All that is wanted is something to lead

(a) 2 Bing. 497.

(b) 10 Ves. 539.

(c) 1 Turn. 104.

(d) Ub. Sup.



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to the conclusion, that it was intended to exercise the power; and here [\*35] the \*words are sufficiently extensive for a devise of all interest, and an execution of all powers.

Mr. *Wilbraham* for the defendants:—All that the court requires is, to see something like an intention to execute the power. *Roach v. Haynes*; (e) *Dillon v. Dillon*. (f)

Mr. *Preston*, in reply:—The will here has been manifestly prepared with skill; and the words used refer to disposition. *Dillon v. Dillon* was decided on the context. *Roach v. Haynes* is quite a different case from the present. No authority goes so far as the proposition contended for on the other side, and the balance of convenience is, clearly, against so extensive a construction as to the execution of powers.

The VICE-CHANCELLOR:—This is the case of an exception, taken by the purchaser, to a title of an estate sold in this cause. The testator under whom the vendors claim, devised to his only son, and his heirs, executors, administrators and assigns, all and singular his manors, messuages, lands, tenements and hereditaments, situate, lying and being in nine several parishes, which he particularly names in his will. In one of these parishes, called Lamyat, he had lands in fee, and also lands over which he had a power of appointment; and all the lands in the parish of Lamyat are included in the present sale. In

five of these parishes, he had only lands in fee; and in three of these [\*36] parishes, he had only lands over which he had a power of appointment.

His son, the first devisee, was an object of the power; but there are devises over, in certain events, to persons who were strangers to the power.

It is admitted that the lands in the five parishes where he had only lands in fee, pass by this will. It is admitted that the lands in the three parishes, where he had only lands subject to his power, also pass by this will, upon the principle that the will, as to the three parishes, would be otherwise wholly inoperative. It is admitted that his lands in fee, in the parish of Lamyat, pass by this will; and the only question is whether the lands pass in the parish of Lamyat, which are the subject of this power.

The purchaser insists that there is no reference to the power; and that the devise of lands in Lamyat, being satisfied by the lands in that parish to which the devisor was entitled in fee, the lands in Lamyat subject to the power do not pass.

For the vendors it is insisted that, in effect, there is a reference to the power; for the admission that the lands do pass in the three parishes, in which the devisor had only lands subject to the power, is an express admission that the devisor had the power in view at the time of making his will. And the vendors further insist that reference is made to the power, by the clause in the will which states that a copy of Mrs. Martin's marriage settlement, under which

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she has a life interest in an estate at Limyat, will be found among the title deeds of the deviser's Lamyat estate.

Mrs. Martin's marriage settlement is not the settlement under which the deviser's power over the Lamyat estate arises; and I do not, therefore, [\*37] perceive how reference is there made to his power.

With respect to the first point made by the vendor, if it were unprejudiced by decision, it would present very great difficulty. But the very point occurred in *Lewis v. Lewellyn*.(g) There the testator, having freehold and copyhold estates, which were subject to his power, and other freehold estates in fee, made a general devise of all his real estates; and it was held that the copyhold estates subject to the power did pass by the will; but that the freehold estates subject to the power, did not pass. In cases of this nature, I think it for the advantage of the public to abide by decision, until that decision is corrected by the court of ultimate resort.

The exception therefore must be allowed.[1]

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#### BLAIN v. AGAR.

1826, 2d and 7th November.—*Joint-stock company.—Fraud.—Parties.*

The shareholders in a joint-stock company are entitled to relief in equity, where the conduct of the directors has been fraudulent, or a violation of the terms on which the company was formed. If several of the shareholders assign by deed their deposits to others, and appoint the latter their attorneys for recovering their deposits, the assignees cannot sue on behalf of themselves and their assignors; but the latter, however numerous, must be parties to the suit.

THE bill was filed by five persons, on behalf of themselves and the other parties to an indenture of the 30th of January, 1826, who were, either originally or by assignment, holders of 1,690 shares in a company called \**"The Royal Stannary, or British Mining Association."* The defend- [\*38] ants were the directors of the company. The bill stated that, in 1825, the defendants, or the majority of them had caused to be printed and published a prospectus, which, after mentioning the capital of the company to be 500,000*l.* in shares of fifty pounds each, the names of the directors, trustees, bankers and other officers, stated that the directors had then the opportunity of selecting in Wales, Devon and Cornwall, several mines which were then being worked, and others in a state fit to make returns as soon as steam-engines, &c.

(g) 1 Turn. & Russ. 104.

[1] A general gift to operate as an execution of a power, must either refer to the power or to the subject of it; and a reference to part of the subject, or to some of many subjects of the power, will not be sufficient to make a will operate as an execution of the power, where there is no other indication of an intention to execute it. *Hughes v. Turner*, 3 Myl. & K. 666. It is a good execution if the will plainly refer to and comprise the subject of the power, although it do not state that it is made in execution of a power. *Hunloke v. Gell*, 1 Russ. & M. 515. *Monk v. Maudsley*, post, 290. *Maples v. Brown*, 2 Sim. 327.

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could be erected, and that they therefore calculated on obtaining almost immediate benefits for the adventurers in the undertaking: that in consequence of this prospectus more than 20,000 shares were applied for before May, 1825: that these applications were acceded to to the extent of 6,200 shares only, the defendants intending to keep the remainder for themselves, in case they could make a profit by sale of them, and, if not, to reject them: that deposits of five pounds per share were paid upon the 6,200 shares to the bankers and upon the account of the directors, and that receipts were given for the same accordingly: that some of the original shareholders afterwards transferred their shares to other persons, by which means the plaintiffs and the other parties on whose behalf they sued, became, in November, 1825, and were, at the time the bill was filed, the holders of 1,690 shares: that since the plaintiffs had purchased their shares they had discovered that some of the persons who were named as directors in the prospectus had never acted as such, but had always been strangers to the affairs of the company, and that such of the defendants [\*39] as were named as directors in the prospectus had of their own sole, assumed authority admitted the other defendants into the directorship: that the plaintiffs were ignorant of the names of all the shareholders except those on whose behalf they sued: that the defendants had taken mines and expended money in working them when part only of the shares had been disposed of, and deposits of five pounds only had been paid even upon those shares: that no deed for establishing or regulating the affairs of the company had been prepared: that the defendants refused to take upon themselves the 3,800 shares they had reserved, or to pay the deposits thereon; and that they had paid 2,500*l.* to a person whom they denominated as the projector of the scheme, but whom the plaintiffs had never heard of before. The bill charged that under these circumstances the moneys which had been paid by the plaintiffs and the other persons on whose behalf they sued, had been obtained by fraud and misrepresentation, and for a purpose which had failed, and could never be carried into effect. It then set forth an indenture of the 30th of January, 1826, made between the persons whose names were mentioned in the schedule thereto, of the first part, and the plaintiffs of the other part, whereby the former assigned to the latter the deposits paid on their shares, and appointed the latter their attorneys to do any lawful acts to dissolve the association, and to recover the moneys thereby assigned from the directors, bankers or trustees of the company: and it was declared that the plaintiffs should stand possessed of the moneys so to be recovered in trust for the parties thereto of the first part. The bill then alleged that the parties to that indenture of the first part were very numerous, and amounted to so many as to render it [\*40] exceedingly inconvenient to place them as parties on the record; and that the doing so would lead to so many difficulties as would render it impossible in effect to obtain a decree. It prayed that the defendants might be decreed to pay to the plaintiffs the sums which had been paid on the shares as before mentioned, with interest.

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The defendants put in a general demurrer to the bill.

Mr. Hart and Mr. Theobald in support of the demurrer :—This association is, to all intents and purposes, a partnership, *Beaumont v. Meredith*.(a) On what principle then can these plaintiffs be entitled to relief in a court of equity? They allege that they have advanced certain sums of money to form the capital of a partnership, which has been abandoned, and that therefore they are entitled to have their money returned. This is nothing but the subject of an action for money had and received. *Nockels v. Crosby*.(b)

Next: this being a partnership, all the partners ought to have been made parties to the suit. Besides most of the shareholders are assignees of shares, and as the shares are mere choses in action, the assignors ought to have been made parties to the suit; for they might have no right to assign their shares. And if the assignors can divest themselves of all responsibility by assigning their shares, the assignees may do so too, by the same means.

\*The bill charges the directors with fraud. Now although the original shareholders might be entitled to prefer this charge against them, their assignees can have no such right; for there is no privity between them and the directors: and, therefore the assignees may have no right to recover the deposits from the directors although the original shareholders might,(c) especially as it does not appear that the shares were transferred with the consent of the directors.

The Attorney-General and Mr. Knight in support of the bill :—The principle upon which these plaintiffs come to a court of equity for relief, is the same as that which prevailed in *Colt v. Woollaston*.(d)

Upon the facts stated in this bill, there can be no doubt that the object of these directors was imposition from the beginning; and that the scheme was a bubble. The directors kept back 3,800 of the shares in order that they might sell them for their own profit, although the whole of the shares might have been disposed of. They moreover have spent all the money that was subscribed, and have given a great part of it to a projector, though no such person was mentioned in the prospectus, and the plaintiffs never heard that there was such a person until they learnt that the money had been paid to him.

This is not a case of a partnership. On the contrary, the plaintiffs expressly disclaim the relation of \*partners. They seek no accounts, [\*42] nor is their object either to establish or dissolve a partnership. They merely say that the defendants have got possession of their moneys, fraudulently, and that they are entitled to get them back again without making any of the other sufferers parties to the proceeding. There is no contract nor any thing in common between these plaintiffs and the other persons who have been deceived. Each sues in his own right, and for his own money. Besides, these plaintiffs sue in two characters, viz., as shareholders themselves, and as

(a) 3 V. &amp; B 180.

(b) 3 Barn. &amp; Cress. 814.

(c) Mitf. 129.

(d) 2 P. W. 154.

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trustees for the parties to the deed of the first part. At all events they are entitled to recover their own deposits.

The bill contains an express allegation, that the plaintiffs are ignorant of the names of all the shareholders, except those who are parties to the deed.

Mr. *Hart*, in reply :—In order to bring this case within the principle on which *Colt v. Woollaston* was decided, it ought to have been alleged that the directors, when they allowed the prospectus to be published, knew that the scheme could not be carried into effect, or was not intended to be. The bill states quite a different case, namely, that they did not allow it to be carried into effect, but, contemplating that it would be a profitable concern, retained a large number of the shares for themselves.

When a record discloses a great variety of interests which are not brought before the court, it is not sufficient for the plaintiff to say that he has not made the persons having those interests parties to the suit, because he does [\*43] not know their names. He ought to \*call upon the defendants to disclose their names to enable him to make them parties to the record.

The Vice-Chancellor, after stating the material contents of the bill, added :—To this bill all the defendants have put in a general demurrer for want of equity.

Upon this demurrer it is not necessary to consider whether the plaintiffs are entitled to the particular relief prayed, but whether they are entitled to any relief ; and, being of opinion that the conduct of the defendants has been wholly unjustifiable, I overrule the demurrer for want of equity.

The defendants have, however, by their counsel, demurred, *ore tenus*, at the bar, for want of parties, who they insist are necessary in order to enable the court to do complete justice in this suit. The plaintiffs sue, on behalf of themselves and certain other persons who are subscribers, together, of 1,690 shares, and who have executed a deed, stated in the bill, by which they assign, to the plaintiffs, their respective interests in this concern, and constitute the plaintiffs their attorneys to institute any action or suit, in order to give effect to their interests, or to enter into any compromise for their claims ; but upon condition that, after deducting their expenses, the plaintiffs are to hold, what they shall so recover or receive, in trust for the said other persons, respectively. Amongst many objections for want of parties, the defendants insist that these other persons ought to have been named as parties to this suit.

[\*44] \*The plaintiffs do not deny that, according to the general principles of a court of equity, these other persons ought to have been parties. But they urge at the bar, what is indeed stated in the bill, that these persons are very numerous, and that naming them as parties on the record, would, in all probability, render it impossible for the plaintiffs to obtain a decree in the cause. This allegation may be very true. In certain special cases the court has adopted a practice which, by permitting one or more persons to represent in a suit all who have similar interests, has avoided the inconvenience which results from numerous parties. But it has never been stated, as a general

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principle, that this course may be taken in all cases within the mischief; nor has it ever done in cases analogous to the present: and, if I were to yield to the reasoning here, I fear I should be doing, what I have no authority to do, not following the practice of the court, but making a new practice.[1] The demurrer *ore tenus*, therefore, for want of parties, is allowed; but it is, of course, without costs.

In the argument in this case, the 6 Geo. 1. c. 18, commonly called "the bubble act," was not adverted to; and in the view which I have taken of the case, it was not necessary to notice it: but, in any future proceeding upon this subject it may be entitled to much attention.[2]

## \*GREEN V. BARRETT.

[\*45]

1826, 2d and 7th November.—*Joint-stock company*.—*Fraud*.

A bill in equity lies to recover deposits paid by a shareholder in a joint-stock company, where the project is a bubble.

THE plaintiff was a shareholder in, and the defendants were the directors of a company called: "The Imperial Distillery Company." The bill stated that ten of the defendants, whose names were mentioned, caused a prospectus dated the 23d of March, 1825, to be printed and distributed, which, after mentioning

[1] But in a later case Lord Chancellor Lyndhurst held that some shareholders in a joint stock company may sue on behalf of themselves and the other shareholders for the purpose of compelling directors of the company to refund money improperly withdrawn by them from the stock of the company and applied to their own use. *Hichens v. Congreve*, 4 Russ. 562. Acc. *Wallworth v. Holt*, 4 Myl. & Cr. 619. But it has been held that in a suit for the purpose of having the affairs of a dissolved joint stock company settled and wound up under a decree of the court, and praying for accounts of the partnership transactions, and that a sale of the partnership property by the directors might be declared fraudulent and void, all the members of the company however numerous, must be parties to the suit. *Evans v. Stokes*, 1 Keen, 24. And see, *Long v. Yonge*, 2 Sim. 369. To a suit by the directors of a joint stock company on behalf of themselves and all other the shareholders, seeking to have the benefit of an agreement entered into by the agent of the company, it is not necessary that all the shareholders should be made parties. *Taylor v. Salmon*, 4 Myl. & Cr. 134. Where there has been a waste or misapplication of the corporate funds, by the officers or agents of the institution, a suit to compel them to account for the loss should be in the name of the corporation, unless it appears that the directors of the corporation refuse to prosecute such suit, or the present directors of the company are the parties who have made themselves answerable for the loss: but in that case the corporation is nevertheless a necessary party. *Robinson v. Smith*, 3 Paige, 222. *Forbes v. Whitlock*, 3 Edw. V. C. Rep. 446.

[2] S. C. Sim. 289. And see the next case. A *bona fide* sale of stock which has a speculative value in the market will not be rescinded, although the stock has been sold at a very extravagant rate, merely on the ground that some of the officers of the corporation have been guilty of a fraudulent deception by which both the buyer and seller were induced to suppose the actual value of the stock was much greater than it really was; the agent of a corporation is not the agent of the individual stockholders, so as to vitiate a sale of stocks on account of his frauds to which the seller was not privy. *Moffat v. Winslow*, 7 Paige, 124.

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the capital of the company to be 600,000*l.* in 12,000 shares of 50*l.* each, the names of the trustees, directors, bankers and other officers of the company, and enumerating the probable advantages to be derived, as well to the partakers in such scheme, as to the public in general, by means of such scheme, proceeded to declare that the affairs of the company were under the management of a board of directors ; that a deed of settlement would be prepared forthwith, which must be executed within thirty days after it should be ready for that purpose ; and that every person who should neglect to execute the same within that time, would forfeit all share and interest in the company ; that the deed was to contain all such clauses and conditions as the standing counsel and solicitors to the company should deem necessary for carrying on the business of the company ; that application was then intended to be made to parliament for an act to enable the company to sue and be sued in the names of its officers, and which deed of settlement, when settled and approved by the standing counsel and solicitors, and the act of parliament, when passed, should be the deed of settlement and act of parliament for managing the affairs of the

[\*46] company ; that the shares would be forthwith \*allotted ; and, all communications were requested to be made to the directors. The bill further stated that the plaintiff having applied for some shares in the proposed joint-stock company, the solicitors or the secretary, by a letter, addressed to the plaintiff, in answer, dated the 25th of March, 1825, informed the plaintiff that twenty shares in the proposed company had been allotted to him in consequence of his application : that this letter required a deposit of 5*l.* on each share, to be paid by the plaintiff to the bankers of the company : that the plaintiff having approved of the scheme developed in the prospectus, and confiding in the truth and accuracy of it, and in the persons named as directors therein, and believing that it would be adhered to and carried into effect, paid to the bankers of the company, on account of the directors, the sum of 100*l.* his deposit upon the twenty shares so allotted to him : that the bankers gave him a receipt for that sum, in which they acknowledged it was received of the directors : that the plaintiff had since discovered that a small part only of the 12,000 shares, of which the company was proposed to consist, was, in fact, disposed of : that the deposits on several of the shares which had been disposed of had not been paid, yet the defendants, as directors of the company, determined to proceed in the scheme, and advertised for the purchase of premises for carrying on the distillery business on an extensive scale : that the ten defendants before named, as such directors, and of their own sole assumed authority (after the plaintiff had paid the deposits on his shares,) chose the two other defendants to be directors, in the place of two persons, who, although named in the prospectus as directors, declined to act, and that, thereupon, another

[\*47] prospectus \*was published, by the direction of the defendants, which entirely, or in a great measure differed from the first prospectus, upon the faith of which the plaintiff had paid his deposits upon his shares ; that by a circular letter which by the order of the defendants was sent to the plaintiff by

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the secretary of the company, bearing date the 4th of July, 1825, the plaintiff was informed that the directors had purchased very valuable and extensive freehold distillery premises, and plant, and was required to pay the further sum of 100*l.* (being 5*l.* each on his shares,) on the 19th when the scrip (thereby meaning the receipts before mentioned) could be exchanged for shares: that the plaintiff perceiving that some of the persons named as directors in the original prospectus, had ceased to be named as directors thereof, that the terms of the original prospectus had not been adhered to, and that no act of parliament had been attempted or was intended to be obtained for the regulation of the company, and having learnt that a small part only of the 12,000 shares had been allotted to, or taken by any person or persons, and that the deposits on all such of the shares as had been so allotted had not been paid, but that nevertheless the directors had proceeded to make such extensive purchase, and to lay out various other large sums of money, as if the whole of the proposed capital of 600,000*l.* had been actually raised, refused to pay the further sum of 100*l.* so required to be paid by him: that he was not privy to any departure from the terms of the original prospectus, upon the faith of which he paid his deposits upon his shares, nor to any of the measures taken by the directors subsequent to the time when he paid his deposits; that the defendants were the persons who then called \*themselves, and had, in all matters subsequent [\*48] to April, 1825, acted as directors of the company, and that all the deposits paid upon shares, were received by Messrs. Bosanquet & Co. as the agents, and upon the account of the defendants, or of the ten first-named defendants, and were held by them at the disposal, and for the use of the defendants: that, by the means aforesaid, the plaintiff's deposit was received by the defendants: that on the first of August, 1825, the plaintiff gave notice in writing to the directors that he was willing to give up his shares to them, on having the 100*l.* he had paid returned to him.

The bill charged that 10,000 shares had never been disposed of and consequently had never existed, and that not so much as 40,000*l.* of the capital had in fact been raised: that, notwithstanding, the directors, without the consent or approbation of the persons who had paid deposits for shares, and without any act of parliament or deed of settlement, proceeded to make extensive purchases and to lay out large sums of money, amounting together to as much as or more than what had been then raised for capital of the proposed company, in various expensive works and undertakings: that the directors had become directors for their own private emolument; and that a great number of shares had been allotted by them to themselves, and that they had sold and disposed of such shares at very considerable premiums: that the plaintiff was ignorant of the names of the other persons who had paid deposits, but he charged that, under the circumstances, the money paid by him had been obtained from him by fraud, or by what in the view of a court of equity amounts to fraud, and by means of misrepresentation, \*and for a purpose which had failed of [\*49] effect, and could not now ever be carried into effect according to the intent and meaning of the first-mentioned prospectus.



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The bill prayed that the defendants might be decreed to repay to the plaintiff, with interest, the 100*l.* paid by him in respect of the shares allotted to him.

Two of the defendants, one of whom was an original director, and the other had been appointed in the place of an original director who had refused to act, demurred, generally, to the bill.

Mr. *Wakefield* and Mr. *John Evans*, in support of the demurrer:—Notwithstanding the bill alleges that, under the circumstances stated in it, the plaintiff's money was obtained from him by fraud, yet, when those circumstances are looked at, they will be found not to amount to fraud. The purpose for which the company was formed, was the carrying on of a fair and legitimate trade. The scheme was not a bubble; nor does the bill charge that it was so, or that it cannot be carried into effect. The only fault that can be imputed to the directors is, that of having acted with too great precipitancy in advertising for premises before they obtained an act of parliament. But after the plaintiff has permitted the directors to lay out money on the faith that his subscription would be paid, he cannot call upon them to repay his deposit with interest. Besides if the plaintiff has a right to recover his money, his only remedy is by an action for money had and received. At all events, the only relief he is entitled to in this court is to have the company dissolved. The bill, however, does not seek that relief.

[\*50] \*Two of the original directors are not made parties to the bill, as they ought to have been: for, although two others were appointed in their place after the deposit had been paid, yet the original directors were not discharged from their liability.

Mr. *Knight*, in support of the bill:—As to the last objection, the two directors who have retired, never acted; and it is charged that all the money came to the hands of the other directors.

The bill states a case of departure from the prospectus amounting to gross misrepresentation; the plaintiff therefore has a right to say that his money has been fraudulently obtained from him, and that it ought to be returned. The defendants have begun to carry the scheme into execution before the deed of settlement, held out in the prospectus, has been prepared. Instead of 12,000 shares 10,000 only have been disposed of, whereby the responsibility of the subscribers has been increased; and on some of these shares the deposits are wholly unpaid. By whom or in what manner are the affairs of the company to be conducted? Nothing is said upon that subject. In this state of circumstances the directors go on spending the money, and applying it to purposes different from those for which it was entrusted to them. The plaintiff has therefore a right to say that he will trust the defendants no longer.

If in this case the plaintiff might have recovered his deposits in an action for money had and received, he is entitled to relief in a court of equity.

[\*51] \*The facts of the case of *Colt v. Woollaston*(a) are of the same nature as those of the present one.

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 1826.—*Russell v. Austwick.*


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*Mr. Wakefield*, in reply :—As expense has been incurred, the plaintiff is not entitled to have his deposit returned. The scheme having been put into action, the only relief he can have is an account.

The Vice-Chancellor stated the material allegations in the bill, and then proceeded as follows :—Assuming the several statements in this bill to be true (which the demurrer does, in form, admit) I am of opinion that the plaintiff is entitled to recover back, from the defendants, the 100*l.* which he has paid ; and that the only question is, whether a bill in equity will hold for that purpose, or whether he must have recourse to a court of law.

I lay no stress upon the allegation that the second prospectus materially differs from the first ; because such material difference is partly matter of law ; and the plaintiff, not having stated the nature of that difference, has not enabled the court to form any opinion upon the subject. Considering that, in substance, the allegations of this bill amount to this, that the prospectus for this undertaking was published, not with any intention to establish a company upon the principles there stated, but as a snare to persons who might unwarily become subscribers, and for the purpose of enabling the directors to make a profit by the sale of shares which they thought fit to assume to themselves, \*it does appear to me that the case is governed by *Colt v. Woollaston*, and, upon the authority of that case, I overrule this demurrer.[1]

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#### RUSSELL v. AUSTWICK.

1826, 9th and 13th, November.—*Partnership.—Carrier.*

A. B. &c. were common carriers from L. to F. a separate portion of the road being allotted to each, and it having been stipulated also that no partnership should exist between them. A. for himself and the other parties agrees with the mint to carry coin from L. to F. and afterwards makes another agreement with the mint to carry other coin to places not on the road : Held that all the parties were entitled to share in the profits of this agreement.

IN June, 1816, the plaintiffs and the defendants agreed to carry on the business of a common carrier, between London and Falmouth, upon the following terms ; that the business should be divided into 181 shares : that the defendants Austwick and Maddeford (who had before carried on the same business, in co-partnership, in and about London) should have equally between them fifty-three of the shares, and should carry on the business between London and Worting, in Hants : that the plaintiff Loscombe should have fifty-four shares and a half, and carry on the business between Worting and Dorchester : that the plaintiffs Russell and Thomas should have thirty-four shares and a half, and carry on the business between Dorchester and Exeter : that the plaintiff W. Courtis should have fourteen of the shares, and carry on the business between Exeter and Plymouth : that the defendant Baker should have

[1] See preceding case.

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 1826.—*Russell v. Austwick.*


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thirteen of the shares, and carry on the business between Exeter and Five Lanes, in Cornwall: and that the plaintiff R. S. Courtis should have the remaining twelve shares, and carry on the business between Five Lanes and Falmouth: but so nevertheless that no partnership should exist, or be construed to exist

between the parties, in regard to their said general concern or undertaking, except as \*between the plaintiffs, Russell and Thomas only, [53] between the defendants Austwick and Maddeford only, and between the plaintiff R. S. Courtis and Baker only, and that the adoption of any general style or firm, for the purpose of conducting the separate concerns aforesaid, or which might give the same the semblance of one concern, should not extend, or be construed, in any manner, to extend, or make, or form a partnership between the said parties, or any of them; but each of them, in his separate limit or division, should be considered as conducting an exclusive business, separate and apart from the others or other of them, and should find their or his own capital for carrying on the said business; and that no one or more of them should be answerable or in anywise accountable for the other or others of them, or for his or their acts, receipts, payments, disbursements, debts, engagements, neglects, or defaults, the intent or meaning of the said parties being to secure an uninterrupted line of communication and carriage from, between, and to the several places aforesaid, consisting of the separate and independent limits and divisions aforesaid, which whole line of communication and carriage neither of the said parties was alone competent, of himself, or equal to keep open and maintain, and the said several parties to be considered, for all purposes, both as between themselves and the public in general, separate carriers, within their respective limits or divisions, and carrying on and conducting several and independent concerns, and not answerable or liable for the debts, engagements, bankruptcies or failures of any other or others of them, in any manner howsoever: that each of the parties should receive all such sums of money as [54] should become payable for the business in his district, and \*should pay certain expenses incurred in that district, and that the balances of such receipts, after deducting such expenses, should be accounted for by each of the parties to the general fund of the general concern and undertaking, quarterly; and that all debts becoming due to the respective parties should be considered as received, and that the said respective balances should be divisible among the respective parties, in the shares or proportions aforesaid; and which quarterly balances or earnings of the said respective parties or districts, after deducting the expenses of such respective parties or districts, and the expenses of supplying horses and other things necessary for working the ground taken by such respective parties, were to constitute the profits of the respective parties or districts.

The plaintiffs and defendants continued to carry on the business under this agreement, from June, 1816 until the end of the same month in 1821.

In January, 1817, the defendant Austwick, having heard that the government were going to issue a new silver coinage, which was to be conveyed to

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1826.—Russell v. Austwick.

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different parts of the country, made an application to G. W. Morrison, esquire, the deputy master of the mint, who desired him to write him a letter upon the subject. Austwick accordingly wrote the following letter, dated the 11th January, 1817 :

" Sir,—Agreeable to your request, I now enclose you a bill expressing all the towns to which the waggons of Messrs. Russell & Co. carry. It will also be proper to observe that they have, for a great number of years, conveyed large quantities of specie to town that have \*arrived per H.M.S. [\*55] and packets at Plymouth and Falmouth. For the conveyance of silver from those places previous to the 1st of July last, 10s. per cent. on the real value was paid, and, since that period, on account of the low price of horse-provender, 8s. per cent. has been paid, and 5s. per cent. for gold, Messrs. Russell & Co. guaranteeing the safe delivery of the same to the Bank of England. The bankers have usually paid 5s. per cent. on the value of their packages, besides the common carriage, which is proportioned to the distance packages are conveyed ; and on the other side have annexed the rates per cent. to the principal towns. I hereby offer to convey his majesty's coin to any of the towns expressed in the inclosed bill, or either of the towns above-mentioned. A broad-wheeled wagon sets out daily which can conveyed four and a half tons ; and I beg to say that we have a repository for valuables at Exeter, where any quantity may be safely deposited previous to its being forwarded to the other inconsiderable towns in Devon and Cornwall. For the responsibility of the proprietors of the said concern I beg to refer you to the gentlemen of the bullion office, Bank of England. Any further information that may be required will be given, with pleasure, by, sir, your most obedient servant, J. Austwick, London proprietor."

Soon after the sending of this letter, an agreement was made between Austwick and the master of the mint, for the conveyance, by the wagons belonging to the different parties, from London to the towns mentioned in the bill which was inclosed in the letter, (and all which towns were in the line of road between London and Falmouth,) of packages of silver coin, at the rate of 5s. per cent. upon the value of the coin in each \*package, besides [\*56] the common charge for the carriage of the packages, as if they had been of no extra value.

Shortly afterwards, Austwick agreed with the deputy master of the mint to convey packages of silver coin to towns in Middlesex and the adjoining counties, the roads to which were, consequently, wholly different from that to the towns before referred to ; and to other places, the roads to which were partly the same as, and then branched off from, the road from London to Falmouth. Under this agreement 7s. 6d. per cent. was to be paid on account of the extra risk in this cross-country conveyance.

The account which Austwick gave of this transaction, in his answer, was that, in consequence of his attending at the mint and learning that no person had offered to carry coin to some parts of the county of Middlesex and the

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bordering counties, to which the general concern of undertaking never were carriers, he consulted with Maddeford, his co-partner, thereon, and they agreed to propose themselves to carry the coin to those places on their own separate account : that, in pursuance of the agreement between him and the master of the mint, various packages of silver coin were delivered to him, at the mint, to be conveyed to different towns, specified in the letter of January, 1817 : that, some time after some of such packages had been so delivered, he discovered, by the directions given to him, that he was required to send a considerable quantity of them to places not specified in the letter, but to other places branching from them : that he then considered that, in the event of any losses [\*57] happening after the packages were delivered to other \*carriers, the general concern would not be liable to make such losses good, but that they would wholly fall on the provincial carrier who might be employed in the conveyance of the packages to the bye-places : that such provincial carriers were, in general, incapable, by reason of their poverty, from making good any heavy losses : that he, on account of himself and his partner Maddeford, thereupon went to the deputy master of the mint, and represented to him the last-mentioned matters, and, at the same time, made a proposal that he would undertake the risk of delivering the packages at the appointed places branching from the towns mentioned in the letter, on condition of his being paid an adequate remuneration for such peculiar risk in becoming general insurer against all the provincial carriers ; and that the deputy master of the mint agreed to this proposal.

The answer further stated that several of the parties in the general concern paid various sums of money, for the carriage of part of the coin, to different carriers, nor parties to such general concern, which sums they carried to his and his partner Maddeford's debit in their private accounts, and were paid or allowed the same, by him and Maddeford, out of their own moneys, without reference to the accounts of the general concern : that the accounts of the general concern were settled in December, 1818 : that the carriage of, and the insurance of 5s. per cent. on the coin carried to places branching from the direct road, were included in those accounts ; but that neither the extra insurance of 2s. 6d. per cent. on the coin conveyed by him and Maddeford and the cross-country carriers, nor the charge for the cartage of such coin, nor any [\*58] insurance \*for the coin carried to the places which were wholly off the line of road, was included in those accounts ; and he admitted that he had received the whole of what he claimed to be due to himself and Maddeford, under the second agreement.

The plaintiffs, in their bill (which was not filed until 1823) contended that the second agreement was made on account of the general partnership, and claimed to have the moneys received under both agreements divided between themselves and the defendants in proportion to the number of their respective shares. The defendant Austwick claimed the whole benefit of the second agreement for himself and his partner, the defendant Maddeford.

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It appeared, by the evidence, that the sums due under both the agreements were paid by checks, which were made payable to the firm in general.

The plaintiffs had examined, as witnesses, the defendant Maddeford, the deputy master, and another officer of the mint; but the whole of the depositions, except that part which proved the checks, was objected to, by the defendants, as not being evidence, and was not permitted to be read.

*Mr. Sugden* and *Mr. Merivale*, for the plaintiffs:—All the parties formed one, entire partnership.

The letter of January, 1817, was the basis of the second, as well as of the first agreement. In it Austwick refers to the repository at Exeter, as belonging to the general partnership, although he had nothing to do with it; and, when he signs his name, he describes \*himself as the London pro- [\*59] prietor. It cannot be contended that the rights of the plaintiffs are at all affected by the circumstance that some of the places to which the second agreement related were wholly off the road from London to Falmouth. That agreement was a mere supplement to, or continuation of the first. When Austwick entered into it, he did not inform the officers of the mint that the coin, about which he was then contracting, was not to be conveyed by the same persons as had conveyed that to which the first agreement related. The officers of the mint of course believed that they were agreeing with the entire partnership; and it cannot be contended that, if there had been any loss, all the partners would not have been liable. If then they participated in the risk, they ought also to share in the profits.

*Mr. Hart* and *Mr. Barber* for the defendants:—This is not a case of a partnership, as between the parties themselves, though it may be, as between them and the public. It is merely a limited engagement of a peculiar species. Each party was to furnish wagons and horses, and to be answerable for losses, and to receive the profits, on his own portion of the road only. The agreement between the parties puts an end to the plaintiffs' claim. It expressly stipulates that there shall be no partnership, except as between Russell and Thomas, Austwick and Maddeford, and Courtis and Baker. In 1818 a settlement of accounts took place between the parties. The plaintiffs then knew that there had been some extra carriage; because the packages which were to be carried to towns which are not upon the direct road, had been left at their warehouses. But, notwithstanding, they made no demand \*in respect of such [\*60] extra carriage, until five years afterwards.

The defendants are, at least, entitled to a reference to the master to ascertain the terms of the second agreement.

*Mr. Sugden*, in reply:—There is nothing upon this record to show that the plaintiffs knew any thing of the second agreement.

The insurance payable under it did not consist of two distinct sums of 5*s.* and 2*s.* 6*d.* but of an entire sum of 7*s.* 6*d.* The original sum was no longer payable: the increased sum was substituted for it. This clearly shows that

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the officers of the mint considered that they were dealing, not with an individual, but with the whole firm.

The VICE-CHANCELLOR:—In the month of June, 1816, the plaintiffs and defendants, upon the retirement of a Mr. Russell from business, became partners in the working of a common stage-wagon from London to Falmouth, and from Falmouth to London; each of the partners being to work the wagon for a certain stipulated distance, and to be paid a proportion of profits accordingly. On the 11th of January, 1817, the defendant, Austwick, on behalf of himself and his said co-partners, by a letter of that date, made a proposal to the deputy master of the mint to convey new silver coin from London to the several towns upon the line of road between London and Falmouth, at certain rates [\*61] of carriage which were specified \*in the letter, and for an additional payment of five shillings per cent. on the value of the packages, by way of insurance for safe conveyance; and, in order to satisfy the public officer, of the responsibility of the partnership to enter into such engagement, the letter referred him for satisfaction in that respect to the gentlemen of the bullion office at the Bank of England. This proposal being accepted, an agreement was made to that effect, between the master of the mint and the defendant, on behalf of himself and his co-partners, some short time afterwards, but when, in particular, does not distinctly appear. The defendant, Austwick, entered into a further agreement with the master of the mint, to cause silver coin to be conveyed from London to towns not in the line of the road from London to Falmouth, nor specified in the defendant's letter of the 11th of January, 1817. The road to some of these towns was partly on the line of road from London to Falmouth, and then branched off; and the road to others of these towns was, in no part, on the line of road from London to Falmouth. The new agreement was for the purpose of guaranteeing the mint against any loss which might happen in respect of the silver coin, when it was not passing on the line of road from London to Falmouth, but on provincial or cross-roads. By this new agreement the mint, in consideration of this guarantee from loss on the provincial roads, were to pay not 5s. per cent. for insurance, according to the first agreement, but 7s. 6d. per cent. for all silver coin sent from the mint, without any distinction whether it was delivered at the several towns specified in the first agreement, or whether it was sent, partially, or wholly, by provincial or cross-roads. In settling with the plaintiffs in respect [\*62] of this transaction with the \*mint, he has accounted with them only for their shares of the profits made according to the first agreement, alleging that the second agreement was entered into by him on the account of himself and his London partner, the defendant Maddeford alone; and that, having reference only to a guarantee on the provincial roads which were not on the line of the common concern, that the plaintiffs had no interest in the profits made by it. It is true that the common concern had no connection with the provincial roads, which were the occasion of the second agreement: and it is not upon that ground that they claim to participate in its profits. But they

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 1826.—*Fellowes v. Lord Gwydyr.*


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insist that the second agreement was entered into by the officers of the mint as connected with, and a continuation of, the first agreement, and in confidence of the responsibility of the parties to the first agreement: and the circumstance that, by the second agreement, 7s. 6d. per cent. is to be paid for the same coin in respect of which 5s. per cent. only was to be paid by the first agreement, although it be true that the addition is made in respect of a new risk, manifests the opinion of the officers of the mint of the connection between the two agreements. The testimony of the officers of the mint upon this subject, is not so pointed as it might have been, if they had been interrogated as to what passed with the defendant upon the second treaty; but it is sufficiently plain that the defendant, Austwick, did not apprise them that he was treating for himself and Maddeford, in exclusion of the plaintiffs, and he does not even assert this in his answer: and, upon the settled principles of equity, therefore, he could not exclude them from the same proportion of profits as they were entitled to under the first agreement.

\*Declare, therefore, that the second agreement, in the answer of the [\*63] defendant Austwick mentioned, is to be considered as made on account of the several parties interested in the first agreement, in the proportions in which they were entitled under the first agreement; and let the accounts be taken accordingly; and let the defendant Austwick pay the costs of the suit to the hearing.[1]

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#### FELLOWES V. LORD GWYDYR.

1826, 10th and 11th November.—*Specific Performance.*—*Misrepresentation.*

If A. in contracting with B. falsely represents himself to be the agent of C., and thereby obtains better terms, the court will, notwithstanding, enforce the contract, unless A. knew that such would be the effect of the misrepresentation.

THE defendant, Lord Gwydyr, being entitled, as deputy great chamberlain, to the fittings-up and decorations of Westminster Hall, at the king's coronation, sold them to the plaintiff, who was his deputy or assistant in that office, for 1,000*l.* The defendant, Page, had formerly been a builder, and had been employed, in that capacity, by Lord Gwydyr's father, who was also deputy great chamberlain, and also in disposing of the fittings-up of the Hall at the trial of the late Lord Melville. The plaintiff did not remove the articles he had so purchased; but in the name, and as the agent of Lord Gwydyr, signed an agreement with Page, for the sale of them to him, for 1,575*l.*; and Page undertook to remove them, and to make good any damage that might be done to the Hall, on or before the 10th of January, 1822. This agreement was signed by the parties at the office of Lord Gwydyr's solicitor, who had previously perused it, and who attested the signature.

[1] Vide *Livingston v. Lynch*, 4 Johns. Ch. Rep. 573. *Massy v. Whitney*, 10 Johns. Rep. 226. *Chase v. Barrett*, 4 Paige, 148.



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[\*64] \*The bill stated that the plaintiff had made the same stipulation with Lord Gwydyr, as to removing the fittings-up, &c. and reinstating the Hall, as was contained in the agreement with Page; and that he had used Lord Gwydyr's name for the purpose of giving, to that nobleman, Page's security for the performance of that stipulation; and that Lord Gwydyr had refused, either to bring an action himself or to permit the plaintiff to use his name in bringing an action against Page for a breach of the agreement. The bill prayed that Page might be compelled to pay the plaintiff the money remaining due to him under the agreement, with interest.

Page in his answer said, that when he entered into the agreement, he was led to believe, by the plaintiff's representations, that Lord Gwydyr was the owner of the articles; that he signed the agreement on the faith that he was dealing with Lord Gwydyr; that he believed from what he had heard of his lordship, and known of his father, that if the articles were not worth 1,575*l* his lordship would not permit him to bear the loss; and that he would not have signed the agreement if he had known that Lord Gwydyr was not entitled to the articles; and that he had sold the articles at a considerable loss. Lord Gwydyr in his answer said that his name had been used by the plaintiff, in entering into and signing the agreement, without his consent or approbation.

Mr. *Horne* and Mr. *Keene*, for the plaintiffs.

Mr. *Heald*, Mr. *Pepys* and Mr. *Warry* for the defendant, Page. The plaintiff must have had some improper object in using Lord Gwydyr's name. [\*65] He had no authority to \*do so from Lord Gwydyr. Can he then be constituted Lord Gwydyr's agent against his will, and come into this court to enforce a contract between Lord Gwydyr and Page, which the former disclaims? Page was induced to believe that the plaintiff was acting as Lord Gwydyr's agent, not only by the representations made to him by the plaintiff but from knowing the connection that existed between them, and from the agreement being perused by, and signed at the office of, Lord Gwydyr's solicitor.

The plaintiff has by misrepresentation obtained more beneficial terms than he could otherwise have done, and, therefore, this court will not interpose on his behalf. *Phillips v. Duke of Bucks.*(a) *Harding v. Cox.*(b)

Mr. *Bligh*, for Lord Gwydyr, asked that the bill might be dismissed as against him.

THE VICE-CHANCELLOR:—If the plaintiff had been aware that the defendant, Page, would not have treated with any other person than Lord Gwydyr, and, for that reason, had concealed his own interest in the transaction, the cases cited would have applied, and would have come to be considered. But there is no reason to suppose that the plaintiff had any knowledge that such was the feeling of the defendant. The plaintiff was naturally led to apply to the defendant Page, because, having been employed in the sale of such fittings-up on a former occasion, he had a decree of experience upon the subject

(a) 1 Vern. 227. 2d edit.

(b) In note to last case

1826.—*Graves v. Dolphin.*

which might incline him to the purchase. The plaintiff states that he used the name of Lord Gwydyr in the written contract, in order that [\*66] Lord Gwydyr might have the benefit of Mr. Page's engagement to clear the hall by a stipulated day. This is not a very satisfactory reason. But if the plaintiff, by the use of Lord Gwydyr's name, really desired to conceal the speculative bargain which he had made with Lord Gwydyr, it would afford no principle upon which the defendant could escape from the contract without special circumstances; and none are proved here. This concealment could work no injustice to the defendant Page. The plaintiff therefore is entitled to a decree for the money due to him upon the contract.[1]

GRAVES v. DOLPHIN.

1826, 13th November.—*Annuity.—Bankrupt.—Assignee.*

An annuity given to A. for his personal support, not to be liable to his debts, and to be paid from time to time into his proper hands and not to any other person, and his receipt only to be a sufficient discharge, passes on A.'s bankruptcy to his assignees.

THE testator, Benjamin Graves, gave his real and personal estates to trustees upon trust (amongst other things) to pay an annuity of 500*l.* to his son John Graves, for the term of his natural life, and then proceeded thus:—"And my will further is, and I do direct and declare that the said annuity, or yearly sum of 500*l.*, by me given to my son John Graves for his life as aforesaid, is by me intended for his personal maintenance and support during the whole term of his natural life and shall not, nor shall any part thereof, on any account or pretence whatsoever, be subject or liable to the debts, engagements, charges or incumbrances of him, my said son; but that the same shall be, for the purpose aforesaid, from time to time, as and when the same shall \*from time to time become due and payable, be paid over into the proper [\*67] hands of him, my said son, only, and not to any other person or persons whomsoever; and I do further direct that the receipt or receipts of him my said son only for such annuity shall be a good and sufficient discharge, and several good and sufficient discharges to my said trustees for the same." John Graves having become a bankrupt, his assignees, sold the annuity to the defendant Freshfield: and the question in the cause was whether the annuity passed to the assignees by the assignment of the commissioners.

Mr. Hart and Mr. Wakefield for John Graves contended that the annuity had not passed to the assignees. They relied on the direction in the will that the annuity should be from time to time paid into the proper hands of John Graves, and that his receipts should be a sufficient discharge for the same.

THE VICE-CHANCELLOR:—The testator might, if he had thought fit, have made the annuity determinable by the bankruptcy of his son: but the policy

[1] Vide *Scott v. Hanson*, ante 13 *Harris v. Kemble*, post 111.

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 1826.—*Mendizabel v. Machado.*


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of the law does not permit property to be so limited that it shall continue in the enjoyment of the bankrupt, notwithstanding his bankruptcy. Declare that the defendant Freshfield is well entitled to the annuity in question.(a)

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[\*68]

*\*MENDIZABEL V. MACHADO.\**

1826, 14th November.—*Plea.*

A plea that the plaintiff has no interest in the subject of the suit, is a good plea to a bill, for discovery and a commission.

By the treaty between France and the Allied Powers, in 1814, and by subsequent conventions, certain funds were placed at the disposal of the king of Spain, to answer the claims of Spanish subjects upon the French government, and those claims were to be adjusted by commissioners, and the funds in the meantime, were by orders of the king of Spain deposited with the defendant.

In 1823, the cortes of Spain voted that these funds should be applied towards the exigencies of the state; and under that vote, the minister of Spain borrowed a large sum from the plaintiff upon the credit of those funds, and the plaintiff took bills for the amount upon the defendant, who refusing to pay them, the plaintiff arrested him, and filed this bill for discovery and a commission to examine witnesses in aid of his action: to this bill the defendant pleaded the treaties and conventions under which the funds came to his hand for the benefit of the Spanish creditors on the French government, and the plea was allowed.

THIS was a bill for discovery, and for a commission to examine witnesses abroad, in aid of an action at law, commenced by the plaintiff against the defendant, to recover a very large sum of money, out of which the plaintiff alleged that he was entitled to be reimbursed the sums which, under the orders of the executive government of Spain, he had advanced to that government.

To this bill the defendant put in a plea and answer. The substance of the plea was that the title to call upon the defendant for the money in question, was not in the plaintiff, but in other parties.

All the important parts of the bill and plea are fully stated in the judgment. It was agreed on the part of the plaintiff to waive any objection that might be made to the defence, on the ground of the plea being overruled by the answer.

[\*69] *\*Mr. Heald and Mr. Russell* for the plea, insisted that, if the facts put in issue by the plea, were true, (and in the present stage of the cause they must be taken to be so,) the discovery sought by the bill must be utterly useless. *Williams v. Everett*, (b) *Yates v. Bell*. (c)

*Mr. Sugden, and Mr. O. Anderdon* for the bill:—It is clear, from the facts stated in the bill, that an action would lie against the defendant for money had and received. But, if the plea is to prevail, there must be an end to any such

(a) See *Brandon v. Robinson*, 1 Rose, 197; S. C. 18 Ves. 429; and 1 Swan, 481, n. [*Green v. Spicer*, 1 Russ. & M. 395; *Piercy v. Roberts*, 1 Myl. & K. 4; *Lear v. Leggett*, 2 Sim. 479; affirmed, 1 Russ. & M. 690. The same rule was adopted and applied in favor of a judgment creditor in *Hallett v. Thompson*, 5 Paigc, 583.]

(b) 14 East, 582.

(c) 3 Barn. & Ald. 613.

1826.—Mendizabel v. Machado.

action; for it would be impossible for the plaintiff, without the discovery which is sought by the bill, to give the evidence necessary to support the action. This is a negative plea to a bill for discovery. It is admitted that there may be a negative plea to a bill for relief: but it is questionable whether such a defence is available against a bill for discovery. There is besides, in this plea, a studied ambiguity as to that part which relates to the particular fund in the hands of the defendant. But, if the case made by the plea is true, it would afford matter for a valid defence at law. It has, however, been decided, in *Hindman v. Taylor*,<sup>(c)</sup> that a plea of matter which is a good defence to the action at law in aid of which the bill is filed, is not a bar to the discovery.

Mr. *Heald* in reply:—There is no such rule, as to bills for discovery, as that which is contended for. In *Baillie v. Sibbald*,<sup>(d)</sup> the statute of limitations was pleaded to a bill for discovery in aid of an action. It might there have \*been said that the matter pleaded to the bill, was a good defence [\*70] to the action at law: but it was not so held by the court, although the plea was overruled upon a different ground.<sup>(e)</sup>

The VICE-CHANCELLOR:—The substance of this bill is, that, in the month of April, 1822, the French government placed at the order and disposition of the Spanish government, a sum of eighteen millions and a half of francs, of the money of France, in rentes or inscriptions in the treasury of France, and that twelve millions of such rentes were shortly afterwards, by order of the executive government of Spain, paid or transferred into the name of Mr. Noguera, who was at that time the charge d'affaires of Spain at Paris; and that, in the month of August, 1822, Mr. Noguera, being removed from his official situation, by the order of the executive government of Spain, transferred such rentes to the defendant Machado, who was confidentially employed, by such executive government of Spain, and had received its instructions to hold the rentes so transferred to him, at the order and disposition of such executive government: that the defendant afterwards, in pursuance of instructions from the executive government of Spain, sold out and transmitted to this country the whole of the said funds, or the greater part thereof to the amount of 300,000*l.*; that the assembly of the cortes, convened according to the constitution of Spain, by a solemn and legitimate act, authorized the executive government to apply and dispose of the said funds to the exigencies of the executive government; and that, thereupon, the \*executive government applied to the plaintiff [\*71] Mendizabel, who was a merchant and one of the contractors-general for supplying the army of Spain, to make advances, for the use of the government, upon the faith and credit of the funds so in the hands of the defendant; and that he, the plaintiff, accordingly made such advances to the amount of 111,565*l.* 12*s.* 7*d.*, and received, in payment of the same, certain orders or bills of exchange, drawn by the treasurer-general of Spain, upon the defendant. The bill insists that the defendant was bound to pay such bills to the plaintiff; and

<sup>(c)</sup> 2 Bro. C. C. 7, S. C. 2 Dick. 651.<sup>(d)</sup> 15 Ves. 185.<sup>(e)</sup> See Beames on Pleas, 276.

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that, having refused to accept or pay the same, he, the plaintiff, had commenced an action against him in this country, and had caused him to be arrested and held to bail, for a sum of 80,000*l*. And the bill prays a discovery, from the defendant, of the several facts stated, and a commission for the examination of witnesses in foreign countries, in order to enable the plaintiff to support his action. The bill contains many charges of admissions and conduct on the part of the defendant amounting to acknowledgment of the plaintiff's title.

To this bill the defendant has put in a plea and answer. He professes to answer all those charges in the bill, which seek to raise a case against him upon the ground of personal conduct and admissions; and, as to all other the statements and charges in the bill, he puts in a plea, for the purpose of protecting himself from any discovery, and in order to deprive the plaintiff of the benefit of the commission for the examination of witnesses.

By his plea he states the several treaties which in the year 1814 were [\*72] entered into between France, on the one part, and the several allied powers, on the other, of which Spain was one, and, especially, refers to the articles of the said treaties, whereby the French government engage to cause to be liquidated and paid all sums due, in countries beyond its territories, in virtue of contracts or other formal engagements, entered into between individuals or private establishments and the French authorities, both for supplies and legal obligations; and also to the articles of the said treaties whereby the several contracting powers engage to appoint commissioners, who were to regulate and effectuate the execution of the former articles, and to employ themselves in the liquidation of the claims thereby provided for.

The plea further states several treaties and conventions, which were afterwards made for the purpose of given effect to the articles referred to: and it appears to me not be necessary particularly to notice them, until we arrive at the secret treaty or convention between France and Spain, on the 26th March, 1818, which professes to have been entered into for the purpose of definitely settling the execution of the articles referred to as far as they regard Spain. By the first article of this treaty, the sum total, to be paid by France to the subjects of Spain, is fixed at one million eight hundred and fifty thousand francs of rentes in inscriptions in the great book of France, representing a capital of thirty-seven millions of francs.

By the second article, in case the part which may be allotted to Spain in the division to be made of the total sum which France will bind herself to [\*73] pay to the subjects of foreign powers, should be below this \*stipulated sum, the French government engages to make up the deficiency.

By the third article this sum of one million eight hundred and fifty thousand francs of rentes is to be divided into two equal parts, one of which is to be paid into the hands of such person or persons as may be appointed by the Spanish government, upon the same terms, and at the same periods as those determined with regard to other powers; and the other part is to remain deposited in the hands of commissioners, appointed for that purpose in equal num-

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bers on both sides, and who shall receive the interest accumulating in a compound ratio, in favor of Spanish subjects, creditors of France, until such time when the mixed commission, to be entrusted with the investigation and liquidation of the claims of Spanish subjects against France, shall have provided the needful means, and the king of Spain shall have provided the needful means for the payment of the said claims.

By a subsequent treaty, between France and all the Allies, dated April 25th, 1818, the sum total which France binds herself to pay to the subjects of all the foreign powers, is fixed at a rente of 12 millions, and 40,000 francs, or a capital of 240 millions and 800,000 francs; and the part allotted to Spain is fixed at a rente of 850,000 francs, representing a capital of 17 millions of francs.

This part, therefore, so allotted, is less, by more than one half, than the sum which, by the secret treaty of the preceding month, France had bound herself to pay \*to Spain; and, by that treaty, France had obliged her- [\*74] self to make up the difference.

The plea further states that, on the 30th of April, 1822, a further treaty was entered into between France and Spain, whereby the French government engages to cause payment to be made, into the hands of such person or persons as may, for that purpose, be authorized by the king of Spain, of the overplus of the rentes, which the French government kept as a deposit, including the whole amount of the compound interest. The plea then avers that the overplus of the rentes mentioned in the last treaty, was that moiety of the sum agreed to be paid by France to Spanish subjects, which, according to the third article of the treaty of March, 1818, was to remain deposited until the claims of Spanish subjects were liquidated by the mixed commission there referred to.

The effect, therefore, of this last treaty seems to have been to place this deposit, not in the hands of a mixed commission, but in the hands of Spanish commissioners only.

The plea then states that the French government afterwards transferred this overplus to Mr. Noguera, who was duly appointed by the king of Spain to receive the same for the purposes in the said treaties and conventions mentioned; and that Mr. Noguera afterwards transferred part, but not the whole, of such funds into the hands of the defendant, who was appointed by the king of Spain to receive them for the same purpose of being applied according to the treaties and conventions. The \*plea then states that, at the [\*75] dates of these treaties and conventions, there were and still are debts due to individuals and to private establishments within the meaning of the said treaties and conventions, to an amount greater than the said overplus of rentes in the hands of the defendant and the remainder of the funds provided for that purpose by the said treaties and conventions, will be able to discharge. And the plea further states that a royal decree was duly made by the king of Spain on the 20th of March, 1824, appointing the commissions for the liquidation

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of the said claims, which it states to have been interrupted by the unfortunate occurrence of March, 1820; and the plea avers that both the said commissions are now in a state of activity.

The plea further avers that the plaintiff had not, nor has any claim to any portion of the funds provided under any of the said treaties and conventions; and that the moneys in the hand of the defendant, which are claimed by the bill, are portion of the overplus of rentes in the said treaty of the 30th of April, 1822, mentioned, or of the proceeds and produce thereof. And the defendant insists upon the said several matters in bar to the discovery and commissions prayed by the bill.

The question to be first considered, therefore, is, whether, taking the several matters stated in this plea to be true, the plaintiff, upon the case made by the bill, has any interest in the funds in the hands of the defendant.

The bill represents that these funds, by virtue of conventional arrangements between the governments of France and Spain, were placed at the order [\*76] and disposition \*of the executive government of Spain, and, by the direction of that government, came into the hands of the defendant, to be held by him at the order and disposition of the said executive government of Spain, as he should, from time to time, be instructed; and that, afterwards, in the year 1823, the assembly of the cortes, then legally convened, authorized the executive government to apply these funds to the general exigencies of the state, and that, thereupon, the then minister of finance in Spain, requested the plaintiff to make certain advances, which were immediately required for the exigencies of the state, upon the credit of these funds; and that the plaintiff did, accordingly, make such advances to the amount of 111,566*l.* 12*s.* 7*d.* and received bills of exchange to that amount, which were drawn upon the defendant, by the treasurer-general of the Spanish nation: and the plaintiff seeks the aid of this court, to assist him in recovering, from the defendant, the amount of those bills.

Now, if the plea of the defendant be true, and for the present purpose it must be taken to be so, these funds were not, by the treaty between France and Spain, placed at the order and disposition of the executive government of Spain, nor did they, by the direction of that government, come into the hands of the defendant, to be applied by him, from time to time, as he should be instructed by that government. But, by the treaties between France and Spain, these funds were raised and paid by France, for the special purpose of being applied in satisfaction of the subjects of Spain who were creditors of France, and were no otherwise placed at the order and disposition of the king of Spain, [\*77] than to enable him to provide for \*the payment of such claims, when the amount of them should be respectively liquidated by the commissioners for that purpose to be appointed. If the king of Spain, himself, had attempted, therefore, to divert these funds from the purpose for which they were advanced by France, and to apply them to the general exigencies of his government, it would have been a direct violation of his engagements with

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France : and, being contrary to the first principles of equity, his purpose would not have been aided by this court.

The cortes cannot, at the utmost, pretend to more than to stand in the place of the king of Spain, and, as this court would not have assisted the plaintiff in recovering these funds from the defendant, if the plaintiff had claimed them, under the order of the king, in repayment of advances made by him for the exigencies of the state, it necessarily follows that he cannot receive the assistance of this court, claiming them in repayment of such advances, not under the order of the king, but under the order of the cortes.

The plaintiff, however, contends that, if he were to admit that his case is such that he can have no title to be relieved in equity, yet he is still entitled to the discovery and commission, which is all he seeks by this bill, in aid of his action at law ; and that the defendant cannot, by plea, protect himself from the discovery. This is surely a singular proposition. For the consequence would be that any person, first suing out a writ at law against another, might, by a bill in equity for a discovery, compel such other person to disclose, upon oath, all the particulars of any transaction, however secret and important, with which the plaintiff had no \*manner-of concern, merely by intro- [78] ducing into his bill the false allegation that he had an interest in the transaction, since, according to the doctrine of the plaintiff, it would not be permitted to the defendant to protect himself from such discovery, by proving to the court the falsehood of the allegation that the plaintiff had any interest in the transaction.

But the law of the court, as well as the reason of the thing, is directly the other way : and a defendant is entitled to protect himself from a discovery, by a plea that the plaintiff has no interest in the subject of his suit : and such is the nature of his plea. This is stated by Lord Redesdale(f) to be the doctrine of the court ; and the case cited by the plaintiff in support of his proposition, when it is carefully considered, will be found consistent with this doctrine.

I have already stated the plea of the defendant is accompanied by an answer. The plaintiff, very properly, waives all objection of form to the answer ; and I have not, therefore, entered into the consideration of it. The plea must be allowed.[1]

(f) Treat, plea. 228.

[1] S. C. 2 Sim. & Stu. 483 ; but in an earlier stage of the cause. In *Robertson v. Lubbock*, 4 Sim. 161, it is said that the decision in *Mendizabel v. Machado*, had been reversed by Lord Lyndhurst, but was not reported. Et vide *Van Kleeck v. The Dutch Church*, 20 Wend. 457. *Rees v. Pariah*, 1 M'Cord (South Carolina,) Ch. Rep. 53. *Story's Eq. Plead.* 626, 630. *Leigh v. Leigh*, post 349. *Jermy v. Best*, post 373.



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[\*79]

\*RHODES v. RUDGE.

1826, 16th and 17th November.—*Will.*—*Assets.*

Testator gave his real and personal estate, to persons whom he afterwards appointed his executors, in trust in the first place to sell an advowson, and apply the proceeds in discharge of his debts and legacies, and if they should be insufficient, then to raise the deficiency by sale or mortgage of his real estates, and directed his executors to retain their expenses, but did not expressly declare any trust of his personal estate. Held that the personal estate was primarily applicable to the payment of the testator's debts.

THE Reverend J. S. Fermor made his will, as follows :—" I give and bequeath all my real and personal estate, whatsoever and wheresoever, unto my friends, Michael Bray and Edward Rudge, esquires, their heirs, executors, administrators and assigns, upon the following trusts (that is to say,) upon trust, in the first place, to sell and dispose of, as soon as conveniently may be after my decease, my living of Crayford, in the county of Kent, and the money to arise by sale thereof to go in discharge of my debts and legacies, and the costs and charges of the trusts hereby created, and to apply the same accordingly ; and, if such money arising by such sale as aforesaid, be not sufficient to discharge the said debts and legacies as aforesaid, upon further trust to cause timber to be felled, on one or all of my said real estates, to the amount in value of 500*l.*, the same to be applied in discharge of my said debts and legacies ; and, if the money arising by sale of such timber, should not be fully sufficient to discharge the same, then upon further trust by mortgage or sale, to raise such deficiency, on all or any of my said real estates, for the purpose of paying off my said debts and legacies, and the costs and charges of the trusts hereby created, and to apply the same accordingly : and upon this further trust, by the ways and means aforesaid, or any of them, to raise and pay the following legacies, which I give to the persons, and in manner following, (that is to say,)

to my dear mother 300*l.* to my dear wife, all such sum and sums of  
[\*80] money as \*shall appear to be due to me, at the time of my decease,

in the books kept by the governor and company of the Bank of England, and the interest and dividends thereof ; and also I give and bequeath to my dear wife all such money as shall appear due and owing to me, from Messrs. Childs & Co. bankers in London : I give to my uncle, Major James Boorden, the sum of 2,000*l.* ; to my godson, Thomas Weston, of Bird's Isle, in the county of Kent, the sum of 200*l.* : to — Taylor, daughter of Jeffery Taylor, of Seven Oaks, aforesaid, apothecary, the sum of 50*l.* ; and to Mary Pett, a very faithful servant, who has lived in my family thirty-six years, the sum of 20*l.* payable on the day of my death ; and also a clear annuity of 20*l.* for her life, to be paid half yearly, by equal portions, the first half yearly payment thereof to be made at the end of six months next after my decease ; and to each of my servants, who shall be living with me at the time of my death, two years' wages, over and above what shall be due to them, respectively, at the time of my decease : and, upon this further trust, that the said trustees, their heirs,

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executors, administrators and assigns, do and shall stand seised and possessed of my said real estates, or so much thereof as shall respectively remain after answering the purposes aforesaid, in trust, as to the rents and profits thereof, for my said mother and wife, during their joint lives, in equal portions; and, after the decease of my said mother, and in case my said wife shall survive her, then in trust for my said wife during her life; but, if my said wife shall die in the life-time of my said mother, then, after the decease of my said wife, in trust for my said mother, during her life; and, from and after the decease of my said mother, then in trust for John Austin, of \*Broadford [\*81] or Seven Oaks aforesaid, during his natural life; and from and after the decease of the said John Austin, then in trust for my sister-in-law, the right honorable Henrietta Benton, spinster, during her life; and, from and after her decease, in trust for all and every the child and children of her body, to be begotten, who shall live to attain the age of twenty-one years, in equal portions, if more than one, and, if but one, then to such one child, and their, his or her respective heirs, executors, administrators and assigns; and, in case my said wife shall marry after my decease, and there shall be any child or children of her body begotten, living at the time of her decease, then it is my will that my said trustees shall stand seised and possessed of my said real estates, or so much thereof respectively as shall remain after answering the purposes aforesaid, from and after the decease of the survivor of my said mother and wife, subject to and charged with the payment of the sum of 3,000*l.*, which, in that event, I give to my said sister-in-law Henrietta Benton (if she shall be then living) in trust for all and every the child and children of the body of my said wife to be begotten, who shall survive her, and shall live to attain the age of twenty-one years, in equal proportions, if more than one, and, if but one, then to such one child, and for their, his or her heirs, executors, administrators and assigns respectively." The testator then directed that the receipts of his trustees should be sufficient discharges for the money to arise by mortgage or sale of his estates, and then proceeded as follows: "And I do hereby nominate and appoint the said Michael Bray and Edward Rudge executors of this my will; and I order and direct that my said trustees and executors, and their heirs, executors, administrators and assigns, \*shall deduct and [\*82] in their respective costs, charges and expenses, and for their trouble in the execution of the trusts hereby in them reposed, or in relation thereto."

Mr. *Horne*, Mr. *Roupell*, and Mr. *Wray*, for the plaintiff:—The testator did not mean to exonerate his personal estate; for, in the first place, the real and personal estates are given to the executors upon certain trusts. Nothing is given to them beneficially. Next, the testator has made no particular disposition of his personal estate. *Duke of Ancaster v. Mayer*.(a) *Gray v. Minnethorpe*.(b)

Mr. *Heald*, and Mr. *Pole*, for the executors:—The question is, whether the

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testator intended his real estate to be primarily liable to the payment of his debts and legacies, not whether he meant to exonerate his personal estate?

It would be difficult to contend that the testator meant to exonerate his personal estate, for the mere purpose of dying intestate as to it. But here he did make a disposition of his personal estate, under which the executors are entitled to it beneficially. The testator declares trusts of his real estate, but not of his personal estate. He merely makes specific bequests of certain parts of it. The direction that the executors shall retain their costs and expenses can have no effect on the construction of the will; for the law would allow them [\*83] to do so without such a direction. The \*case of *Dawson v. Clurk*(c) is precisely in point. That case came before Lord Eldon, C. upon appeal, and the decision was affirmed.(d) In *Southouse v. Bate*, the attention of Sir W. Grant, M. R. was again called to it, and his honor then said that he thought that the executors, as such, would have been entitled even if they had not taken by the direct bequest.(e) *Bootle v. Blundell*.(f) *Coningham v. Mellish*.(g) *Paice v. The Archbishop of Canterbury*.(h) *Rogers v. Rogers*.(i)

The testator orders his living at Crayford to be sold, in the first place. This is a direction to sell it at all events; and the words "in the first place" are quite as strong as the word "fully," which was relied on in *Stephenson v. Heathcote*.(k) In speaking of the money to arise by the sale of the timber he uses the identical word "fully." He does not say, that if the money to arise from the sale of the living and the timber, together with his personal estate, shall not be sufficient to discharge his debts; but if the money to arise by those means alone shall not be sufficient for that purpose, then his real estate shall be sold. It is clear, therefore, that he did not intend his personal estate to be applied in payment of his debts and legacies until the money to arise by sale of his real estate should be exhausted.

Mr. Hart and Sir George Hampson for the executor of the testator's mother, who had been in possession of a moiety of the estates, did not argue the question as the plaintiffs waived the taking of the account of the rents and profits received by her.

[\*84] \*Mr. Pechell for the defendant, Henrietta Burton, the administratrix of the testator's widow:—The provision in the will for the payment of the executors' costs, shows that they were not meant to take the personal estate beneficially. The sale of the living is directed to be absolutely made. There is no allusion to any prior fund. The testator does not speak of the payment of his debts as having begun, but as if he was providing an original fund for that purpose *Burton v. Knowlton*.(l) When he speaks of the proceeds of the sale of the timber, he speaks conditionally; not as if the payment of his

(c) 15 Ves. 409.

(f) 1 Mer. 193.

(i) 3 P. W. 193.

(d) 18 Ves. 247.

(g) Prec. Cha. 35.

(k) 1 Mer. 224.

(e) 2 V. &amp; B. 399.

(h) 14 Ves. 364.

(l) 3 Ves. 107.

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debts was completed. When he again mentions his trustees, he adds their executors, administrators and assigns. These words are applicable to personal estate, and are inconsistent with the notion that he had nothing but real estate to dispose of. *Hancox v. Abbey.*(m)

The VICE-CHANCELLOR :—The bill in this case is filed for the execution of the trusts of the will of the Rev. J. Shirley Fermor: and the single question in the case is, whether the personal estate of this testator, not specifically bequeathed, is exempt from the payment of his debts and pecuniary legacies?

It has long been the settled rule of courts of equity, that the direction of the testator to sell or mortgage his real estate for the payment of his debts and legacies, is not alone evidence of the intention of the testator that the personal estate should be exempt from those charges, and amounts only to a declaration that \*the real estate shall be so applied to the extent in which [\*85] the personal estate, which, by law, is the primary fund,[1] shall be insufficient for those purposes. In order to exempt the personal estate, there must be found in a will, either express declarations to that effect, or provisions from which such intention of exemption is to be inferred.[2] In this, as in all other cases of inference or implication, except necessary or logical implication, there may be a difference of opinion between judges who are called to consider the case. The duty of each judge, after full consideration, is to declare his own opinion. This testator begins his will by giving all his real and personal estate to his friends Michael Bray and Edward Rudge, their heirs, executors, administrators and assigns, upon the following trusts (that is to say) upon trust, in the first place, as soon as conveniently may be after his decease, to sell and dispose of his living at Crayford, and all the money to arise by sale thereof to go in discharge of his debts and legacies, and the costs and charges of the trusts thereby created; and, if such money be not sufficient to discharge the said debts and legacies, then he authorizes his trustees to fell timber on his other real estate, to the value of 500*l.* for those purposes, and, if such sum of 500*l.* be not sufficient to pay his debts and legacies and the costs and charges of the trusts, then to raise the deficiency by sale or mortgage of any of his real estates. He then proceeds to give certain legacies, and afterwards to dispose of the residue of his real estate, and appoints his trustees, M. Bray and E. Rudge, to be his executors, with a direction that his said trustees and exe-

(m) 11 Ves. 179.

[1] Vide *Rogers v. Rogers*, 1 Paige, 188. *McKay v. Green*, 3 Johns. Ch. Rep. 56. *Livingston v. Newkirk*, id. 312. *Stuart v. Ex'r of Carson*, 1 Desaus. 500, 513. *Dunlap v. Dunlap*, 4 Desaus. 305. *Haleyburton v. Kershaw*, 3 Desaus. 105. *Wise v. Smith*, 4 Gill & Johns. 295. *McDowell v. Lawless*, 6 Mon. (Kent.) Rep. 141. *McC Campbell v. McC Campbell*, 5 Litt. (Kent.) Rep. 95. *Hall v. Hall*, 2 McCord, (So. Car.) Ch. Rep. 302. *Miller v. Harwell*, 3 Murphy, (No. Car.) 194. *Philips v. Parker*, Tamlyn, 136.

[2] When there is a specified lien on the land devised, as in case of a mortgage; or where the land is devised upon the condition of paying the debts; or where the debts are directed to be paid out of the estate devised; in these cases the real estate will be first resorted to, to discharge the debts. *Rogers v. Rogers*, 1 Paige, 188.

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cutors should deduct and retain their respective costs, charges and expenses, and for their trouble in the execution of the trusts thereby in them [\*86] \*reposed, and in relation thereto, without naming out of what fund.

It is argued, for the trustees and executors, that the first gift of the personal estate to them, though expressly declared to be upon trust, is nevertheless a gift to them, for their personal benefit, because the gift to them is not, as executors, but as trustees, and is to be construed as if it were given to trustees who were not executors; and that then, according to the case of *Dawson v. Clark*, the personal estate would vest in them, subject only to the trusts which the testator should declare in his will; and that, having declared no trusts in his will as to the personal estate, the whole personal estate belonged beneficially to the trustees, though executors also. If it were admitted that this case was within the authority of *Dawson v. Clark*, and that the personal estate were beneficially given to the trustees, though executors, the question would still remain whether it was more than a gift of the residue of the personal estate, and whether, in their hands, the personal estate was not primarily applicable to the payment of debts and legacies? But, upon a careful perusal of the case of *Dawson v. Clark*, the residuary personal estate was held to vest beneficially in trustees, who were afterwards named executors in the will, because the words of the gift were to them upon trust, in the first place, to pay and charged and chargeable with all his just debts and funeral expenses, and that the trust was not general, but was qualified by the words "charged and chargeable," so as to extend to the amount of the charges only; and that no trust was applied to the surplus after satisfaction of the charge; and it was clearly Lord Eldon's [\*87] opinion that, if the gift \*had been to the executors, *eo nomine*, by the same words, they would equally have been entitled to the surplus. In the present case there is no such qualification of the trust; but the whole real and personal estate is expressed to be given, generally, upon the trusts which follow. The case of *Dawson v. Clark* is not therefore, applicable here. The direction in this will that the trustees and executors should deduct and retain for their respective costs, charges and expenses, and for their trouble in the execution of the trusts, affords a conclusive inference that it was not the intention of the testator that they should take any beneficial interest: and, upon the whole, I am of that, in this will, there is no beneficial gift of the personal estate.

If there be no gift of the personal estate except the gift to the trustees upon the trusts which follow in the will, then there is nothing in the will which can be treated as evidence of the intention of the testator that the personal estate should be exempt from the payment of debts and legacies, other than that the testator has not added, to the charge of the real estate for that purpose, that it should only be in aid of his personal estate, and that the testator begins the declaration of trust by directing the trustees, in the first place, as soon as conveniently might be after his decease, to sell his living at Crayford, and to apply the pro-

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duce in discharge of his debts and legacies. With respect to the first point, it is to be observed that the rule of the law directs the primary application of the personal estate, and such declaration of the testator to that effect is not necessary. And, with respect to the second point, if it be supposed that this testator considered his personal estate not specifically bequeathed as of \*inconsiderable amount, and that, at all events, the produce of his living [\*89] would be required for the payment of his debts and legacies, it would sufficiently account for the form of this expression; and although, on account of the uncertainty of the amount of the personal estate of a testator at the time of his death, it is not safe to aid the construction of a will by evidence of the amount at the time of making his will, yet such an assumption may fairly be made in reasoning in aid of the intention, as it is to be collected from all the parts of the will. My conclusion is, that the real and personal estate, being both given, generally, to the trustees upon the trusts declared in the will, and there being no trust declared in the will to which the personal estate can be applicable, except the payment of debts and legacies, and the testator not having prescribed, as between the real and personal estate, the order of payment, the rule of law must govern the application, and the personal estate must be primarily applied. Let it be declared, therefore, that this testator's personal estate, not specifically bequeathed, was first applicable to the payment of his funeral expenses, debts and legacies.[1]

[1] Vide *Welby v. Rockliffe*, 1 Russ. & M. 571; *Driver v. Fearand*, id. 681; *Clutterbuck v. Clutterbuck*, 1 Myl. & K. 15. As to personal estate it is now settled, that though express words are not necessary to exonerate it, yet there must appear from the entire will an intention, not merely to charge the real estate, but so to charge it as to exempt the personal. *Lloyd & G.* 295, n. and cases there cited. "It has been held in all the cases that the direction to trustees to apply the produce of the sale of the real estate in payment of debts, funeral expenses and legacies, does not alone imply the exoneration of the personal estate; and in many cases it has been held, that a gift of the rest and residue of the personal estate imports a gift after payment of debts, funeral expenses and legacies." Sir John Leach, *M. R. Walker v. Hardwick*, 1 Myl. & K. 396. "The court is often embarrassed by having to decide whether the personal estate is exonerated from the payment of debts by the real estate being charged therewith; it is not necessary to say in so many words that it shall be exonerated; when the intention is so expressed, there is no question, but when it is left ambiguous, the rule is in a very unsatisfactory state, namely, that the intention of the testator is to be followed. As to legacies the case is very different; they are created by the testator at the time of making his will, and have no fund specially dedicated by law to the payment of them, and consequently any specification by the testator of a fund for their payment, is more attended to than in the case of debts, for the payment of which there is, independently of the will, a legal fund." Lord Ch. Sugden, *Lamphier v. Despard*, 1 Con. & Law. 205, 206. Personal property specifically bequeathed, and not as a mere *residuum*, is not the primary fund for the payment of debts, if by the same will lands are given to the sons of the testator, who are directed to pay his debts; to exonerate the personal property in such case, it is not necessary that there should be express words of exoneration. *Speaker v. Van Alstyne*, 18 Wend. 200. Circumstances *dehors* the will ought not to be called in to assist the explanation; and upon a charge affecting the real estate is not the proper debt of the deceased himself, his heir or devisee is not entitled to have it paid out of the personal estate. *Lil. & G.* ubi sup. and cases there cited.

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1826 — *Maddeford v. Austwick. Austwick v. Maddeford.*


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[\*89] \**MADDEFORD V. AUSTWICK. AUSTWICK V. MADDEFORD.*(\*)

1826, 19th and 20th November.—*Agreement.—Fraud.*

A partner, who superintended, exclusively, the accounts of the concern, agreed to purchase his co-partner's share of the business, for a sum which he knew, from accounts in his possession, but which he concealed from his co-partner, was an inadequate consideration : the agreement was set aside.

THE original bill was filed to set aside an agreement made by the plaintiff with the defendant, his co-partner, for the sale of his share of the partnership business. The cross bill sought to enforce the agreement.\*

The pleadings and evidence were very voluminous ; but the substance of them is so fully contained in the judgment, that no other statement is necessary.

Mr. *Heald*, Mr. *Sugden*, and Mr. *Cooper*, for the plaintiff in the original bill.

Mr. *Hart*, and Mr. *Barber*, for the defendant.

THE VICE-CHANCELLOR :—On the 20th of June, 1816, the plaintiff *Maddeford* and the defendant, with certain other persons, entered into an agreement with Mr. *Russell*, who had, for some years, carried on the business of a common carrier from London to Falmouth and from Falmouth to London, to purchase that business upon certain terms, the particulars of which are not material to the present question.

The several purchasers agreed, among themselves, to divide the road from London to Falmouth between them ; and the plaintiff and defendant, as [\*90] partners, \*engaged to work the wagon to Worting, and from Worting to London. Each concern was, separately, to be at certain expenses upon their own line of road, and were to receive, for their separate profit, the bookage, cartage, portage, and other matters of that nature. Other expenses were to be provided for out of the common stock, and all other receipts were to be carried into the common stock ; and ultimately divided in certain agreed proportions, the whole line of road being considered as divided into 281 parts, and the plaintiff and defendant being to receive 53 of those parts.

It is proved, in the cause, that the plaintiff was wholly employed in the out-door business of the partnership concern ; that is, in buying and selling horses, and in the purchase of horse provisions, and other matters of that nature ; and that the defendant was principally employed in the in-door business, and, especially, in keeping the accounts, and in the superintendence of the clerks who were employed for that purpose.

The partnership proceeded, without any settlement of accounts, until the month of April, 1817 ; the plaintiff, from time to time, drawing out moneys from the concern for his private and separate use, as he had occasion for them ; and having, up to that time, drawn out sums amounting, altogether, to upwards of 1,400*l.* In that month of April, 1817, a written agreement was come to be-

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 1826.—*Maddeford v. Austwick. Austwick v. Maddeford.*


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tween the plaintiff and defendant, whereby the plaintiff agreed to accept a sum of 1,000*l.* in addition to the moneys which he had drawn out, in full for his shares of the profits of the partnership \*concern up to the end of [\*91] the year 1817; and the plaintiff further agreed to accept a sum of 900*l.* a year, for his future share of the profits for the next three years.

This agreement was carried into effect; and the plaintiff received the 1,000*l.* as an immediate payment, and afterwards duly received the 900*l.* for the three ensuing years.

At the end of three years a further agreement was come to between the plaintiff and defendant, whereby the plaintiff was to become the purchaser of the partnership concern, upon the terms therein stated, and possession of the partnership property was, accordingly, given up by the defendant to the plaintiff, who has since carried on the business on his own account. But no deed has yet been executed, to give effect to this latter agreement. A deed for that purpose was prepared; but the plaintiff having expressed his dissatisfaction at the agreement made in April, 1817, and having insisted that he had been unfairly dealt with in that agreement, the defendant refused to execute the deed of dissolution of the partnership, and assignment of the partnership business to the plaintiff, unless the plaintiff would, at the same time, give to the defendant a general release, which the plaintiff refused to do.

The original bill here is filed by the plaintiff, for the purpose of avoiding the agreement of April, 1817, and for an account of the actual profits made in the concern, from the commencement until its dissolution in 1821, and for payment to the plaintiff of a moiety of those profits, after allowing credit for the moneys \*already received by him, and also for the execution of a deed [\*92] to give effect to the agreement of 1821.

The cross bill is filed, by the defendant in the original suit, for the purpose of having the original agreement of April, 1817, confirmed; and for the execution of the deed of dissolution and assignment of the partnership property to the plaintiff, about which there is no dispute between the parties.

The plaintiff Maddeford seeks to avoid the agreement of 1817, upon the ground of fraudulent misrepresentation by the defendant Austwick; but there is no direct proof of any misrepresentation. It is, however, to be inferred, that the defendant Austwick must have stated to the plaintiff, that the terms proposed by him were a fair consideration. That the proposal for such an agreement originated with the defendant Austwick, is proved by his letter of the 11th February, 1817. That the public books of account belonging to the concern, to which all parties had access, were of an intricate nature, and required considerable experience and attention to understand and make them out, is proved by the book-keeper, Chase. That the plaintiff is not conversant with accounts, is proved by the same Mr. Chase, and also by Mr. Wright. The particular nature of all these public books has not been explained to the court; but it is clear they did not contain any statement of an account between the plaintiff and defendant.



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At the time the agreement was entered into between the plaintiff and the defendant, the defendant had in his possession a private book, which did contain a statement of the accounts between the plaintiff and the defendant, made out by the defendant, whereby it appeared that the 1,000*l.*, which the [\*93] defendant agreed \*to pay to the plaintiff in addition to the moneys which he had drawn from the concern, would have been nearly but not quite, a fair consideration, if no profits had been made from the concern of the mint : but that, taking the mint profits into the account, which the defendant was unquestionably bound to divide with the plaintiff, it would be many hundred pounds less than the plaintiff would be entitled to receive.

The defendant, being the partner whose business it was to keep the accounts of the concern, could not, in fairness, deal with the plaintiff for his share of the profits of the concern, without putting him into possession of all the information which he himself had with respect to the state of the accounts between them. The defendant knew, from the account in his possession, that the 1,000*l.* was not an adequate consideration for the plaintiff's share of profits ; and he cannot be permitted, in a court of equity, to maintain advantage which he has gained over the plaintiff's ignorance ; and the plaintiff, for that reason, appears to me to be entitled to avoid the agreement of 1817. The supposed account of the profits of the concern, up to the end of 1817, necessarily formed the basis of the plaintiff's calculation of profits for the ensuing three years ; and, being misled in that respect, he is entitled to avoid the whole agreement, and to have an account of the profits of the concern up to the dissolution in 1821.

The defendant's argument of confirmation of the agreement by the subsequent conduct of the plaintiff, fails altogether ; it not being pretended that, at the time of such acts on the part of the plaintiff, he was aware of the advantage which the defendant had gained over him.[1]

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[\*94]      \*THE COLOMBIAN GOVERNMENT *v.* ROTHSCHILD. (\*)

1826, 22d November.—*Jurisdiction—Foreign States.*

A foreign state may sue in this court ; but where a bill was filed by " the government of the state of Colombia and Don M. J. Hurtado, a citizen of that state, and minister plenipotentiary from the same to the court of his Britannic majesty, and now residing at 33 Baker-street, Portman-square, in the county of Middlesex," a general demurrer was allowed to the bill, because the description of the plaintiffs did not enable the defendants to know upon whom process was to be served, in case a cross bill were filed.

It is not now necessary that a bill for an account should contain an offer by, the plaintiff to pay the balance if found against him.

THE bill commenced as follows : " complaining, show unto your lordship, the government of the state of Colombia, and his excellency Don Manuel Jose

[1] *Vide Pike v. Vigors*, 2 Dru. & W. 224, 225 ; *Harris v. Kemble*, post, 111.

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Hurtado, a citizen of the said state, and minister plenipotentiary from the same to the court of his Britannic majesty, now residing at No. 38 Baker-street, Portman-square, in the parish of Mary-le-bone, in the county of Middlesex.\* It stated that the senate and house of representatives of the state of Colombia having, on the 30th of June, 1823, decreed that a loan to the extent of thirty millions of hard dollars, being about 7,500,000*l.* sterling, should be raised upon the credit, and for the service of that state, Manuel Antonio Arrubla and Francisco Montoya, citizens of that state, were, under the decree, appointed commissioners of the state for raising the loan, with the most ample powers and authorities to negotiate and contract for it on such terms as might seem to them most advantageous to the state, and to pledge, for the redemption of the principal and payment of the interest, the branches of the revenue of that state, appropriated for that purpose by the decree: that the commissioners, in pursuance of the powers and authorities so given to them, in April, 1824, entered into \*a negotiation with Lyon Abraham Goldschmidt, since [\*95] deceased, and Maurice Jacob Hertz; then carrying on business under the firm of B. A. Goldschmidt & Co. for raising a loan of 4,750,000*l.* sterling on the credit and for the service of the state of Colombia; and that Messrs. Lyon Abraham Goldschmidt and Maurice Jacob Hertz, having agreed to be employed in raising it, a memorandum of agreement, dated the 14th of April, 1824, was executed, by or on behalf of Arrubla and Montoya, of the one part, and Messrs. Goldschmidt & Co. of the other part; and that in pursuance of a stipulation contained in that memorandum, a complete agreement, in writing, dated the 15th of May, 1824, and made between Arrubla and Montoya, on behalf of the government of Colombia, of the one part, and Messrs. B. A. Goldschmidt & Co. of the other part, was prepared and executed, and thereby Arrubla and Montoya engaged, on the part of the government of Colombia, to grant a general mortgage-bond for 4,750,000*l.* sterling, and to deliver to Goldschmidt & Co. in a proper state for circulation, 23,150 certificates, which were to be signed by the plaintiff Hurtado: that the mortgage-bond should be considered as an absolute, inviolable and indestructible pledge, mortgage and security on all the revenues of the state of Colombia, present and future: that all moneys the proceeds of the loan, should be placed at the disposal of Hurtado, and that his receipts should be a full discharge to Goldschmidt & Co.; and all arrangements which Goldschmidt & Co. might make with him respecting the execution of the agreement, or any other matters or things proceeding from or connected with the loan, were thereby approved of, by Arrubla and Montoya, in the name and on the behalf of the state; and Arrubla and Montoya did thereby, as agents \*of the state, and by virtue of the [\*96] decree and of the powers and authorities vested in them, bind the state of Colombia, and all the public authorities thereof, which did then or might thereafter exist, to perform faithfully and truly all the therein foregoing engagements and conditions.

The bill then stated that the senate and house of representatives of Colum-

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bia, by a decree dated the 1st of May, 1825, ratified this agreement, and that it was immediately after its execution carried into effect; that Hurtado advanced and paid to Goldschmidt & Co. on the account and to the credit of the government of Columbia, 57,000*l.* sterling on the 1st of May, 1824; 41,000*l.* sterling in June, 1824; and 20,927*l.* 2*s.* 5*d.* on the 29th of July, 1825; and that Goldschmidt & Co. did, at divers times during the years 1824 and 1825, on the application and under the sanction of Hurtado, as the representative of the state of Columbia, purchase and ship, for the use, and on the account and at the risk of the government of that state, considerable quantities of shot, muskets, gunpowder and other military stores, and also of doubloons, dollars, gold bullion, silver bullion and other treasure, all which stores and treasure were consigned to the agent for the time being of that state at Carthageina, or elsewhere in South America; and, on occasion of such shipments being made, the bills of lading and invoices of the articles so shipped, were handed to Hurtado, by Goldschmidt & Co. who placed the costs of these articles, and the amount of the charges of purchasing and shipping the same, to the debit of the government of Columbia, against the proceeds of the loan; and that

[\*97] Goldschmidt & Co. did also, on the credit of the coming proceeds \*of the loan, from time to time pay drafts or bills of exchange drawn, by the minister of finance of the state of Columbia, on Hurtado, and which were by him made payable at the house of Goldschmidt & Co. and debited the government of Columbia with the amount of the payments; and that they also, during and since the year 1825, from time to time, in compliance with the stipulations in the agreement of the 15th of May, 1824, and by the directions of Hurtado, purchased up a considerable number of the certificates issued in respect of the loan, for the sinking fund of the loan, and, with the amount of the purchase-money paid by them for these certificates, and of the costs of brokerage for the purchase thereof, they debited the government of Columbia against the proceeds of the loan; and that, by these dealings and transactions between B. A. Goldschmidt & Co. and the government of Columbia, there subsisted an account between them which had never been settled.

The bill prayed that an account might be taken of all sums received by Goldschmidt & Co. for or on account of the government of Columbia, and of all sums paid and expended by them unto or for the use of the government; and that what, on the balance of such accounts, should appear to be due and owing from the firm might be paid to Hurtado, as the representative of the Columbian government.

To this bill the defendants demurred for want of equity.

[\*98] The *Attorney General*, and Mr. *Pemberton*, for the demurrer:—"No persons appear before the court in a character which enables them to sustain this bill. The plaintiffs are described as the government of the state of Columbia, and Don Manuel Jose Hurtado joins as a citizen of that state.

There is no mutuality in this case. For suppose it were necessary for the defendants to file a cross bill, how are the plaintiffs in this bill to be described

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when made defendants: How is a subpoena to issue against them? Would it be sufficient to have a subpoena against Don José Hurtado? Certainly not; for it has been decided that an ambassador does not represent his government in a court of justice. So far, therefore, as relates to what is called the state of Columbia, Hurtado has no right to sue, nor can he be sued. Even if it were admitted that a foreign state can sue in equity, surely there must be some mode of enforcing a cross equity against it. It is, however, doubtful whether a foreign state can sue in a court of equity. From the books it appears that the king of Spain has been allowed to bring an action at law. But the remedies and the forms of process in a court of equity, make it much more difficult to show how a foreign state can maintain a suit to enforce an equitable demand. At law there are no cross equities or cross claims. But where an account is to be taken, or an agreement to be performed and enforced by the process of a court of equity, it is not easy to see how it can be done. Suppose, on taking an account at the suit of a foreign state, the balance is found to be against the plaintiffs, in what manner can the payment of that balance be enforced? In the case of the *Nabob of the Carnatic v. The East India Company*,<sup>(a)</sup> [\*99] an anecdote is mentioned of the king of Spain being, by the advice of Selden, outlawed to prevent his bringing an action. But how could the state of Columbia be outlawed? If a court of equity is to entertain a suit at all, it must see that it can enforce justice, as well on behalf of the defendant as of the plaintiff. This bill, indeed, charges that Hurtado, the co-plaintiff, has been the agent of the state, and is the proper person to receive what is claimed to be due to the state. But that, instead of a reason why he should be a plaintiff in such a bill, is a sufficient reason why he should not. Nor indeed does he submit by the bill, as every accounting party ought to do, to pay the balance if any should be found due from him on taking the account. It is, however, of great importance to observe that, in 1824, at the time when the transaction took place in respect of which relief is sought by the bill, there was no such state in existence—no body of persons who had any right, in this country, to assume to themselves the title which is now assumed by the plaintiffs in this bill. It was not till 1825 that the state of Columbia was recognized by the government of this country.

Another question, therefore, arises upon this bill, whether it is competent to the subjects of this country to treat with a foreign government not recognized by the government of this country? That question came before the Lord Chancellor in the case of the Peruvian loan, *Jones v. Del Rio*.<sup>(b)</sup> In that case it appeared that the Peruvian government, which is recognized [\*100] by this country, contracted with Mr. Kinder for raising a loan, to be secured on the revenue of that government. Some of the parties who advanced money on that loan became greatly dissatisfied with the transaction, and a bill

(a) 1 Ves. jun. 371. See 386, n. S. C. 3 Bro. C. C. 292; 4 Bro. C. C. 180; and 2 Ves. jun. 56.

(b) Not yet reported.

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was, therefore, filed against Kinder, Everett and other persons concerned in it. On an application to the court, after that bill was filed, the Lord Chancellor suggested the objection as to how he could recognize such a transaction with a government not recognized by this country; and whether transactions of such a nature might not create an interest adverse to the public interest of the British nation. That objection was not very palatable to any of the parties concerned in the case; but the Lord Chancellor insisted on its being argued. In the course of the argument, the Lord Chancellor made many very strong observations, which showed an opinion that such transactions could not be recognized in a court of justice. The case was, however, ultimately decided on the ground that, as the plaintiffs sued on behalf of themselves and others, though the plaintiffs wished to annul the contract which was the subject of the suit, yet the other parties might not wish to do so: and on that ground his lordship dissolved the injunction. In the present case, the subsequent recognition of the state of Colombia by the government of this country, could have no effect as to the antecedent transaction which is now brought in question; for, although the crown has the right to bind the country by treaty with a foreign state, that treaty does not affect the rights and claims of individuals, unless there be some express stipulation on the subject.

[\*101] \*Mr. Sugden, Mr. Pepys, and Mr. R. Grant, for the bill:—

1. Assuming that the state of Colombia was not recognized by the government of this country at the time when the agreement was made, it cannot be disputed that, soon afterwards, and before the bill was filed, it was solemnly recognized by the British government. On the 18th of April, 1825, that recognition took place, and, from that time forward, the state of Colombia became invested with all the rights of other independent states, and, as such, can sue and be sued in this country. By a decree of the state of Colombia, made after the recognition by this country, that state has acceded to the agreement which is the subject of this bill.

2. As to the right of a sovereign state to sue in this country, there can be no doubt what the usage has been in this respect. There are many bills now on the files of this court, in which the king of Spain is plaintiff. In a recent case, the *King of Spain v. Mendizabel*, the Lord Chancellor made an order restraining the defendant from bringing an action at law; but it did not occur to any one that it was possible to prevent the plaintiff from having relief in the character of a sovereign prince. There is no authority against it. This case is not to be put on what or how many the individuals are, who constituted the government of Colombia. Any sovereign or state which is known and recognized by a general appellation, may sue as such, under that appellation. No man can deny that, at the date of the agreement, the state of Colombia, though not recognized by this country, was in existence, and, therefore, it was capable, by the law of nations, of being a party to a contract. It might be capa-

[\*102] ble of contracting, and yet be unable to enforce the contract in a particular country, on account of particular reasons. But is the recog-

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nition of the state by this country to affect the validity of the contract? Certainly not; because that recognition is a matter merely of political expediency, depending on reasons purely political. What the Lord Chancellor is stated to have said, in the case of *Jones v. Del Rio*, must be considered as spoken by his lordship in his character of a statesman merely; and it is impossible not to see that many transactions tending to embroil this country with a foreign power, may be liable to great objection in the view of a statesman, without being at all questionable in a court of justice. The validity of a contract, as a contract, does not depend on the law of any particular state, but on there being parties capable of contracting. Where the contract is valid, the contracting parties must be able to enforce it in a court of justice. Every writer on the law of nations has laid it down that a sovereign independent state is competent to enter into a valid contract. Vattel describes it as one of the attributes of a state.<sup>(a)</sup> But this demurrer assumes the existence of the government of Colombia, as described in the bill; the objection therefore ought to be by a plea.

3. Don M. J. Hurtado, who joins as a plaintiff in this suit, states himself to be a citizen and plenipotentiary of the state of Colombia; and also describes himself as an individual residing in a particular street in London. He is so described also in the agreement, and that description gives him, as an individual, all the powers necessary to enable him to maintain this suit alone. There can be no doubt that he, at least, has \*full authority to file this bill. The [\*103] moneys in question never found their way directly to the state of Colombia, but to Hurtado; and, on the faith of the agreement, he has paid large sums of money to the defendants. Therefore, if the court should be of opinion that the government of Colombia, as a government, cannot sue in this case, still there is before the court a plaintiff entitled to sue on the rights which he has acquired under the contract.

4. As to the objection that the bill, being for an account, does not contain any offer to pay the balance if found against the plaintiff, such an offer is not now considered necessary. The mere filing of a bill for an account enables the court to do all justice between the parties.

(The Vice-Chancellor said that the court had originally required that a bill for an account should contain an offer on the part of the plaintiff to pay the balance if found against him; but that was not now considered necessary.)

Mr. Hart, Mr. Horne, and Mr. Collinson, appeared for other defendants, but were not called upon to argue the case.

The VICE-CHANCELLOR :—It does not appear to me to be necessary to notice the several objections which have been made to this bill.<sup>(b)</sup>

\*A foreign state is as well entitled, as any individual, to the aid of [\*104] this court in the assertion of its rights: but it must sue in a form which

(a) Lib. 1. c. 1, sec. 4.

(b) These objections were, that the agreement was usurious, and that as no relief was prayed, against the defendant Rothschild, the demurrer was at all events good as to him. [Vide *Thomson v. Powles*, 2 Sim. 194.]

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makes it possible for this court to do justice to the defendants. It must sue in the names of some public officers who are entitled to represent the interests of the state, and upon whom process can be served on the part of the defendants; and who can be called upon to answer the cross bill of the defendants. This general description of "the Colombian government," precludes the defendants from these just rights; and no instance can be stated in which this court has entertained the suit of a foreign state by such a description.

Demurrer allowed.[1]

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[\*105] \*THE ATTORNEY-GENERAL v. THE EARL OF LONSDALE. (\*)

1827. 25th January.—*Charity*.—*Election*.

Where the trusts of a deed and will were, to found a school, for the education of gentlemen's sons, in a particular house, built by the founder; and it was provided that, if the school was not established, the funds should be applied, at the discretion of the trustees, to some other purpose conducing to the good of the county of Westmoreland and the parish of Lowther especially; the charity, as to the school having altogether failed, by the school house having been built on a part of the founder's family estate, of which he was tenant for life only, the court referred it to the master to settle a scheme for the benefit of the county of W. and the parish of L. especially.

To raise a case of election there must be a form of a gift as to the property which the donor had no power to dispose of.

THE information prayed that a school might be endowed and established pursuant to the trusts declared by John Lord Viscount Lonsdale, by certain indentures dated the 4th and 5th of May, 1697, and by his will. The defendants were the present Earl of Lonsdale, and several members of his family, who claimed to be entitled, in remainder, under the family settlements, to the estates in question.

By the indentures of May, 1697, after reciting that John Lord Viscount Lonsdale designed to found and settle, at Lowther, in the county of Westmoreland, a school of learning, for the education of gentlemen's sons there; and, to that purpose, in the town of Lowther had erected and built from the ground a large and fair house, wherein the said school should be kept, and they taught and educated accordingly; and, for continuance and support thereof, had resolved to settle a competent revenue, whereby and out of which, such masters, and other persons there to be placed, or employed to keep, teach, and manage the school, might have proper salaries for their labor and maintenance, and that

[1] Foreign governments and foreign corporations may maintain suits both at law, and in equity in the courts of this country. *Silverlake Bank v. North*, 4 Johns. Ch. Rep. 370. Story's Eq. Plea. 57. *Bank of Augusta v. Earle*, 13 Peters 519. But no sovereign is entitled so to sue unless he has been recognized by the government of the country in which the suit is brought. *Gelston v. Hoyt*, 3 Wheat. 324. Story, ubi sup.

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the school might be continued and kept, and gentlemen's sons therein educated and taught, from thenceforth for ever thereafter, John Viscount Lonsdale \*conveyed to thirteen trustees, the manor of Darnbrooke in the county [\*166] of York, and all his lands and hereditaments in Darnbrooke, and the impropriate rectory of Hale, in Cumberland, and a farm called Armstrong's tenement, in the parish of Kirklevington, in Cumberland, and all that the school-house lately erected by him at or in the town of Lowther, with the soil and ground whereon the same stood, 'to hold the same unto the trustees, their heirs and assigns for ever, upon trust to permit him to make leases, for twenty-one years, or any other term, of the manor and premises, and to receive the rents and profits thereof for the good of the school, for his natural life, and, after his decease, out of the rents and profits to pay, yearly, for ever, such salaries or sums of money, to such masters, and other persons there to be placed, or employed to keep, teach, and manage the school, in such proportions, at such times, in such manner, and under such conditions and terms as he should at any time thereafter, by any writing under his hand and seal, to be attested by three or more credible witnesses, appoint or declare, and to employ and bestow the residue of the rents and profits from time to time in and about the necessary repairs of the school house, and other incidental charges.

John Viscount Lonsdale afterwards made his will, dated the 16th of September, 1698, and thereby gave to his executors, their heirs or assigns, the manor of Darnbrooke, and all his messuages, lands, tenements, and hereditaments in Darnbrooke (excepting the mines of lead, coal, and all other minerals, royalties, and franchises within the manor,) and also his rectory and parsonage of the parish of Hale in Cumberland, and his proportional part or share of the tithes of the territories, village, or hamlet of Brisco, in the parish of \*Saint John in Cumberland, theretofore had and enjoyed, together with [\*107] the rectory of Hale, in trust to be a fund, or to employ and dispose of the rents and profits thereof for the maintenance and salary of the schoolmasters of the free school for which he had erected a house in Lowther, and for the management of the same, and upon such trust and for such purpose to settle the manor and premises upon trustees, in such manner, and under such laws, statutes and constitutions, as to his executors should seem meet and expedient; or otherwise upon such trusts, and for such other purposes as his executors should think most conducing to the good of the county of Westmoreland, and, especially of the parish of Lowther: and he devised divers manors and estates to such persons of his name and blood as would become entitled, under the settlement, to the estates therein mentioned: and he appointed three of the thirteen trustees and two other persons his executors.

Although John Viscount Lonsdale had power to dispose of the manor and other premises with which the school was meant to be endowed, the school house was built on part of the family estate, of which he was tenant for life only. The school was, nevertheless, established therein in his life-time, and was continued for about forty years, when the first tenant in tail under the fami-



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ly settlement coming into possession of the estate, suffered a recovery, and thereupon, discontinued the school, and it has ever since ceased, and the rents and profits of the premises with which it was intended to be endowed, have been enjoyed by the Lowther family, and, when the information was filed, were received by the defendant, the earl of Lonsdale.

[\*108] \*Mr. Attorney General and Mr. Pemberton for the information, insisted that the trusts of the deed of May, 1697, ought to be established; or if they had failed because John Viscount Lord Lonsdale had no power to dispose of the school house, then that the trusts of the will ought to be carried into execution: that, as the will gave large benefits to the defendants who now claimed the school house under the family settlement, they were bound, on the principle of election, either to renounce those benefits, or to confirm the intention of John Viscount Lonsdale as to the school house: that there was, at any rate, a clear, general devise for charitable purposes; as schools of learning were expressly mentioned in the statute of charitable uses.

Mr. Hart, Mr. Shadwell and Mr. Wray, for the defendants:—It is clear that the trusts of the deed of 1697 cannot be established; 1st. because the school, being for the education of gentlemen's sons, is not a charity: 2dly, because the purpose was to found the particular school in the parish of Lowther; and, as that cannot be carried into effect, because John Viscount Lonsdale had no power to dispose of the school house, the gift must wholly fail. The charity intended by the will, must also fail, for the same reasons. Those who claim under the family settlement, are not bound, by way of election, to devote the school-house according to the intention of John Viscount Lonsdale; because there is not, in the will, any gift of the school house to the trustees of the school. The words of gift for general charitable purposes, are too vague to have effect as a good devise for a charity. But, even if it were not so, [\*109] effect could not be given to them on this information, \*which does not extend to establish the trusts of the will. This is one of those cases in which, on the principles stated by Lord Hardwicke, in *Bor v. Bor(a)* the doctrine of election does not at all apply.

The VICE-CHANCELLOR:—The institution of a school for the sons of gentlemen, is not, in popular language, a charity; but, in the view of the statute of Elizabeth, all schools for learning are so to be considered; and on that ground no objection can be made to the trusts of the deed of 1697.

But the purpose of that deed being to found the school in the particular school house in the parish of Lowther, which cannot be effected because John Viscount Lonsdale had no power to dispose of that school house, it appears to me that the trusts of that deed must altogether fail.

I think the trusts of the will as to that school must fail for the same reason; there being no gift of the school house to the trustees of the charity, so as to bind those who claim under the family settlement, by way of election.

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It may be collected, from the will, that he had an intention to give the school house to the trustees of the charity. But there is no authority for stating that a party is put to his election, under a will, unless, in the will, there be the form of a gift as to the property which is to pass by election.[1]

\*The will, after directing the rents and profits of the manor, lands [\*110] and rectory in question to be applied, for the purposes of the school, as to his executors shall seem meet and expedient, adds the words following: "or otherwise upon such other trusts or for such other purposes as my said executors shall think most conducing to the good of the county of Westmoreland, and especially of the parish of Lowther;" this amounts to a clear direction that, if, for any reason, the testator's intention as to the school should fail, the manor, lands and rectory intended for the endowment of the school, should be applied to other charitable purposes: and the court is bound to carry this intention into effect.

Declare, therefore, that the trust created by John Viscount Lonsdale as to the school at Lowther, has failed, by reason that he had not power to dispose of the particular school house; but that the manor and lands of Darnbrooke, and the rectory and parsonage of Hale, with the glebe lands and tithes thereunto belonging, and the proportional part or share of the testator in the tithes or tenths of Brisco, within the parish of Saint John, in the county of Cumberland, heretofore had and enjoyed with the rectory of Hale, are well given, by the will of the said John Viscount Lonsdale, to charitable uses; and refer it to the master to inquire of what particulars the property now consists, and in whose occupation and possession the same now are, and under what circumstances, and what is now the rent or annual value thereof, and of every part thereof, and in whom the legal estate is now vested: and declare that the defendant, the Earl of Lonsdale, is to account for the amount of the rents and profits of the said several premises which have been received by him, or \*to his use, from the commencement of the term of six years before [\*111] the filing of this information; and let the master take such account accordingly; and let the master settle a scheme, for the application of the rents and profits of the said several premises to some charitable purpose or purposes conducing to the good of the county of Westmoreland, and especially, of the parish of Lowther, and for the future trusts and management thereof; and let the master tax the costs of the informant, the attorney-general, to the hearing; and let the same, when taxed, be paid by the defendant the Earl of

[1] In *Cooke v. Briscoe*, 1 Dru. & W. 616, Lord Ch. Plunkett, speaking of the case in the text observes "the words there attributed to Sir John Leach, as to the necessity of 'the form of a gift' must be inaccurate; all the cases show that if there is a plain intention to give, it is sufficient to raise an election." "There is nothing," says Lord Brougham, "more undoubted in the law, than that to make a case of election, the intention must appear certainly and clearly, both as to the property assumed to be disposed of, and as to the implied condition to be fulfilled." *Dummer v. Pitcher*, 2 Myl. & K. 262. See further as to election, *Fuller v. Yates*, 8 Paige, 325. *Shuttleworth v. Graves*, 4 Myl. & Cr. 35.

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Lonsdale : and reserve the consideration of all further directions and subsequent costs, and the extra costs of the informant, until after the master shall have made his report.

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### HARRIS V. KEMBLE.

1827, 12th April.

An agreement will not be avoided by reason that representations, made by one party to the other, upon the subject of the agreement, are not correct, if it be manifest that the party making the representations is speaking, not from personal knowledge, but with reference to accounts which were equally open to both parties, and if the representations be justified by those accounts.

THE facts in this case are stated in the judgment, it is unnecessary to report them in the usual manner.

Mr. *Sugden* and Mr. *James* appeared for the plaintiff; Mr. *Heald*, Mr. *Twiss* and Mr. *L. Lowndes* for the defendants, *Kemble*, *Willett* and *Forbes*; Mr. *Shadwell* for the defendants, *Harrison* and *Trotter*; and Mr. *Hart* and Mr. *Rawlins* for the defendant, *Const.*

The judgment was as follows :

[\*112] \*The VICE-CHANCELLOR :—In the month of March, 1822, the plaintiff, *H. Harris*, was entitled to fourteen twenty-fourth shares of the property of *Covent Garden Theatre*. The defendants, *Kemble*, *Willett* and *Forbes*, were then entitled together to seven twenty-fourth shares, and the defendant, *Const*, was then entitled for life to the remaining three twenty-fourth shares; and the reversion of these three twenty-fourths was then vested in persons claiming under the will of *Mrs. Martindale*, to whom the defendant, *Const*, was executor. On the 11th of March, 1822, the plaintiff, *Harris*, and the defendants, *Kemble*, *Willett* and *Forbes*, entered into the agreement which is the subject of this suit. And the effect of this agreement is, that the defendants, *Kemble*, *Willett* and *Forbes*, as between themselves and the plaintiff, should be considered as the lessees of the theatre, for a term of ten years, to be computed, retrospectively, from the 1st of August, 1821, at a rent of 12,000*l.* which would, in effect, be to give the plaintiff, during that term, by way of rent, for his shares, the annual sum of 7,000*l.* But there being at this time, a very heavy debt upon the theatre, amounting to between 60,000*l.* or 70,000*l.* it was agreed that no part of this rent should be paid to the plaintiff until that debt was discharged; and that the whole profits of the theatre should, in the mean time, be applied in the reduction of the debt. The plaintiff appears to have had no other property at command than his interest in this theatre; and, in order to provide an income for his subsistence, until the debt was paid off, it was agreed that he should receive, from a Mr. *Rodwell* and a Mr. *Boscha*,

[\*113] certain annual rents, paid by them to the proprietors of the theatre, for the use of the fruit rooms, and for the hire \*of the theatre for the per-

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formance of oratorios: and that the plaintiff should also receive an annual sum of 240*l.* which was stated to be payable, by Sir Edmund Antrobus, as the rent of a private box for alternate weeks. The sums thus received by Mr. Harris were computed to amount together to 1,360*l.* a year, and were to be received by him in the nature of a loan; and, when the debts should be discharged, the plaintiff was to account for these sums upon that principle.

Mr. Harris, the elder, the plaintiff's father, who was proprietor of one half of the theatre, and who died in October, 1820, had been, for many years, the manager of the theatre, at a salary of 1,000*l.* a year: and he was succeeded, in his property in the theatre, and in the management, by the plaintiff, who, having been educated for the bar, had quitted his profession, and had for twelve years assisted his father in the affairs of the theatre. The defendants, Kemble, Willet and Forbes, appear to have been dissatisfied with the plaintiff's management, and to have been desirous of saving the salary of 1,000*l.* which was paid to him in that respect; and they seem to have entered into this agreement with the plaintiff, rather for the purpose of obtaining the management of the theatre to themselves, than with a view to any other profit from the bargain. They first proposed that the rent should be determined, annually, by the actual profit of the theatre. But the plaintiff, protesting against that principle, required that the rent should be computed at 15,000*l.*, and afterwards offered himself to become the lessee at a rent of 13,500*l.* a year. The defendants say that they refused this offer, because they questioned the \*responsibility of the [\*114] plaintiff, and considered the offer as a mere artifice of treaty; and, afterwards, ultimately they agreed to become lessees of the theatre at a computed rent of 12,000*l.* a year. The defendants seem to have expected that Mr. Const, as the proprietor of one-eighth of the theatre, for his life, would have concurred in the intended lease, and the name of Mr. Const, as a party, was originally introduced into the draft of the agreement. This expectation was, however, disappointed; and the agreement was executed by the plaintiff, and the defendants Kemble, Willett and Forbes, without Mr. Const being a party. Immediately after the execution of the agreement, the plaintiff retired from the theatre, and the management was assumed by the defendants, Kemble, Willett and Forbes. In this management they continued when Mr. Const filed his bill in the court of chancery, on the 15th of April, 1823, against the plaintiff and the defendants Kemble, Willett and Forbes, thereby stating a certain deed, bearing date the 9th of March, 1812, by which the then proprietors of the theatre contracted with each other, that the funds of the theatres should be applied in payment of certain specified debts until the whole thereof were satisfied, and stating, further, that some of such debts remained undischarged, and that the funds of the theatre were now applied contrary to the provisions of the deed of 1812; and praying therefore that effect might be given to the deed of 1812, and, for that purpose, that a receiver of the profits of the theatre might be appointed. In this suit, an order was made by the Lord Chancellor for the appointment of a receiver, on the 19th of February, 1824: and, four

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days afterwards, the defendants Kemble, Willett and Forbes, caused a [\*115] letter to be written to the \*plaintiff, with notice that they altogether repudiated the agreement made with the plaintiff in March, 1822, whereby they were to become lessees of the theatre, stating, as a reason, the appointment of a receiver in Mr. Const's suit, under the deed of 1812, and alleging that the plaintiff was a party to that deed, but that they, the defendants Kemble, Willett and Forbes, had, at the time of the agreement with the plaintiff, no notice of its existence. The parties to that deed of 1812 were Mr. Harris, the father, who was then possessed of one half, or twelve twenty-fourths of the theatre; the plaintiff Harris, then possessed of two twenty-fourths; the late Mr. John Philip Kemble, then possessed of four twenty-fourths; the late Mr. White, then possessed of three twenty-fourths; and the late Mrs. Martindale, then also possessed of three twenty-fourths. The deed of 1812 appears to have been acted upon for a year or two only, and then to have been abandoned: and, at the time of the appointment of a receiver, there remained unpaid, of the debts intended to be provided for by that deed, a sum under 10,000*l*. It was in the month of August, 1813, that the defendants, Willett and Forbes, who had married two daughters of Mr. White, became entitled to the three twenty-fourths, which, in 1812, had belonged to him: and, in the month of November, 1820, the defendant Kemble became entitled to the four twenty-fourths, which in 1812, had belonged to Mr. John Philip Kemble. Upon the death of Mrs. Martindale, the three twenty-fourths which had belonged to her in 1812, vested in Mr. Const, as her executor, in the manner I have before stated. On the 24th of April, 1824, the plaintiff Harris filed the present bill for the purpose of compelling the defendants, Kemble, Willett and Forbes, [\*116] to adhere to the agreement of the 11th of March, 1822; \*and Mr.

Const is made a party defendant to this bill, the plaintiff insisting that, although not a party to the agreement between the plaintiff and defendants, he had, by his subsequent conduct, entitled the plaintiff to call upon him, in a court of equity, to confirm it. With respect to Mr. Const it may be well to state, at once, that the plaintiff has not established any case against him; and that the bill, as to him, must be dismissed with costs. The defendants, Kemble, Willett and Forbes, by way of defence to this bill, first insist that, having entered into the agreement of March, 1822, with the plaintiff, solely for the purpose of acquiring the management of the theatre, and having lost that management by the appointment of a receiver in Mr. Const's suit, they are no longer bound by their agreement with the plaintiff. It is to be observed that, in the agreement of March, 1822, the plaintiff expressly contracts that he is not to be bound to the performance of the agreement further than as it is to be performed by, or is applicable to him; and the defendants, Kemble, Willett and Forbes, expressly contract that they will be bound by the agreement, not only so far as it is to be performed by, or is applicable to them, but so far as is applicable to, or to be performed by Mr. Const, or is applicable to the estate of Mrs. Martindale, which he represents; and it appears to me, therefore, to be against the clear effect of

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this express contract that they now seek to make the plaintiff responsible for the act of Mr. Const.

These defendants next insist that they had no notice of the deed of 1812, under which the receiver is appointed; and that, as the plaintiff was a party to that deed, and is to be taken to have known that it might \*be [\*117] used as an instrument to defeat that possession and management of the theatre, which, on the part of the defendants, was the motive of the agreement, it was the plaintiff's duty to have apprised the defendants of that deed; and that he, not having done so, they are entitled to be released from their agreement with the plaintiff. It is not pretended that there was any intentional concealment of this deed on the part of the plaintiff. It had long been abandoned and lost sight of by all parties concerned; and the very persons under whom these defendants claim having executed that deed, it is not easy to understand upon what principle it can be material whether these defendants had or had not actual notice of the deed. But, if that were material, I should be bound to declare, upon the evidence in the cause, that these defendants are to be affected, in this court, with notice of that deed.

These defendants next insist that, although the plaintiff did oppose the appointment of the receiver, yet, after the receiver's appointment, he supported the proceeding of Mr. Const to have the moneys, paid to the receiver, secured in this court; and that the payment of the money into court being contrary to the terms of the agreement of March, 1822, which placed the moneys in the hands of these defendants, they, for that reason, are entitled to be relieved from the agreement. That the plaintiff did support the proceeding of Mr. Const to have the moneys paid to the receiver secured in this court, is not disputed. The present bill of the plaintiff to enforce the agreement of March, 1822, was then depending; and the support given by the plaintiff to Mr. Const's proceeding, cannot be represented as evidence of an intention to abandon the \*agreement. It is said, for the plaintiff, that he at the same time stre- [\*118] nuously insisted on the agreement, but that these defendants having given him the notice that they repudiated the agreement, he had a right to use his efforts to secure the receipts of the theatre, in this court, as a measure that would be beneficial to him in the alternative of the defendants succeeding to avoid the agreement. Whether the plaintiff's view of the subject, or his conduct, in this respect was or was not correct, it is not necessary for me to state. It is enough to say that his conduct in that respect can form no ground upon which these defendants can retire from the agreement in question.

These defendants next state that, for want of more correct information, they were obliged to make their calculations, as to the rent that ought to be paid for the theatre, from statements and accounts furnished by the plaintiff, and purporting to be founded upon his personal experience and his knowledge of the affairs of the theatre; and that the statements and accounts so furnished by him were incorrect and erroneous; and that they were misled by them, and are therefore entitled to be relieved from the agreement; and they refer to

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particular statements and accounts in support of this allegation. Before I enter into the consideration of these particulars, it is necessary to premise some general facts. During the management of Mr. Harris, the father, and of the plaintiff, all accounts of the theatre were kept by Mr. John Brandon, the treasurer; and it is admitted by the defendants that the accounts so kept were, at all times, open to their inspection, and were repeatedly inspected by them, and, with these accounts they were so well acquainted, that one of the [\*119] defendants \*suggested an alteration in the mode of keeping them which was actually adopted. These defendants allege, in certain passages in their answers which have been read as evidence, that Brandon was an incompetent person to manage the accounts, and that he did not, in fact, understand the same, and that he improperly left the same in a great degree to his son, James Brandon: and further, that, in consequence of the imperfect and irregular manner in which the accounts had been kept during the management of the plaintiff and his father, there were not any means, in the year 1821, whereby the defendants could ascertain the exact amount of the debts of the theatre, or of their own liabilities consequent thereon: and, further, that they were informed by Mr. Harrison, who was the medium of communication between the plaintiff and the defendants in the treaty which led to the agreement in question, that he, Mr. Harrison, had repeatedly declared to the plaintiff, pending the treaty, that the plaintiff did not understand and was incompetent to manage the accounts of the theatre; and that he did not know the true state of the accounts of the theatre; and that he did not understand the nature of accounts, or of profit and loss. Mr. Henry Robertson, who was appointed by the defendants when they took upon themselves the management of the theatre, to be treasurer in the place of Mr. Brandon, and who is now the receiver under the Lord Chancellor, and who is represented as a skilful accountant, being examined as a witness on the part of the defendants, deposes that, from the obscure manner in which the accounts were kept by Mr. Brandon, he does not conceive that the true state of the affairs of the theatre, and the actual profit and loss that had been made prior to the date of the [\*120] agreement between the \*plaintiff and defendants, could have been collected, from the books and accounts, by any person not intimately acquainted with the management of the theatre, or without the most minute and laborious examination thereof by a person well accustomed to the examination of accounts. In the agreement of March, 1822, between the plaintiff and defendants, there is a provision that a list of the names of the creditors of the concern then to be made out and signed by the parties, is not to be deemed conclusive as to any items or accounts contained therein, or omitted to be included therein, or as to any debt or demand omitted therefrom; but that all just and correct debts, whether stated or omitted in that list, were to be fully satisfied. And this provision amounts to an admission to the same effect as Mr. Robertson's testimony.

Having made these preliminary observations, I shall now proceed to the

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particular statements and accounts of the plaintiff, of which the defendants complain.

The treaty for a lease of the theatre from the plaintiff to the defendants, commenced, according to Mr. Harrison's evidence, in the month of December, 1821; and, at the beginning of the treaty, a letter bearing date the 21st of that December is written, by the plaintiff to Mr. Surman, for the purpose of being communicated by him to Mr. Harrison on the part of the defendants. That letter is proved as exhibit (L.) and the material part of it is in the words following: "The total amount of the receipts during the eleven seasons is 991,811*l.*; average per season, 82,650*l.* Now I have no doubt one third of the above sum may be accounted as profit; and I am sure if the sums were calculated \*which have been paid (independently of the expenses [\*121] of working the theatre,) that I should be fully borne out in my assertion. In a letter which I am preparing, and which I mean to address to Mr. Harrison on the delivery of our list of debts, &c., I shall touch more fully on this subject, and shall show under how much more advantageous circumstances any tenant of Covent Garden Theatre would now stand, than my father and myself have stood during the term of extreme pressure from enormous debt, &c. &c." This letter was forwarded by Mr. Surman to Mr. Harrison; and it is said, by the defendants, that, founding their calculation on the statement here made by the plaintiff, they were greatly deceived; for, although it appears, by Mr. Brandon's accounts, that the receipts for the eleven seasons did amount to 991,811*l.* being the sum stated by the plaintiff, yet this sum, to the amount of 66,289*l.* was partly made up by moneys received on benefit nights, which were afterwards paid over to the actors to whom the benefits belonged, and partly by money advanced by the bankers, and ought not, therefore, to have been included in any computation of profits; and they prove these facts by the evidence of Mr. Robertson: and they then proceed, with certain comparative statements of figures, to show the effect that would be produced, in calculation, if the plaintiff's statement as to the 991,811*l.* had been correct, and if the profits could have been rightly estimated at one third of the gross receipt. It does not appear to me necessary to follow these calculations. The plaintiff, in this statement of 991,811*l.*, must be understood to refer to Mr. Brandon's accounts, which were equally open to the plaintiff and the defendants, and not as speaking from personal knowledge: and Mr. Brandon's accounts, upon the \*face of them, justify that state- [\*122] ment: and, as the defendants at that time complained of the imperfect and irregular manner in which Mr. Brandon kept these accounts, and had been informed, by Mr. Harrison, that the plaintiff did not know the true state of the accounts of the theatre, and did not understand the nature of accounts, or of profit and loss, the defendants cannot reasonably state, in a court of justice, that they either did rely, or were warranted to rely upon this representation made by the plaintiff, or were misled by it. The plaintiff's



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estimate of the profits at one third of the gross receipts, professes to be nothing more than a mere conjecture on his part.

The defendants further allege that they were induced to believe, by the representations of the plaintiff, that a saving of 200*l.* a week, or 2,000*l.* a year might be made in the expenses of the theatre, and, that in this respect, they were also misled. Upon this head the defendants refer to a letter, from the plaintiff to the defendant Willett, which is dated, on the 27th July, 1820, and is proved as exhibit (A.) and also to two exhibits (G.) and (H.) which were inclosed in a letter, written by Mr. Surman, on the part of the plaintiff, to Mr. Harrison, which is dated on the 3d of October, 1821; and it is proved as the exhibit (F.) It is to be observed that the exhibit (A.) was written in the lifetime of Mr. Harris, the elder, when there could not possibly exist the least idea of the defendants ever becoming the lessees of the theatre; and it must be under very special circumstances indeed, which have no existence here, that a

letter written at that time could be brought to bear upon the subsequent [\*123] treaty, as a representation affecting that treaty. But if it were admitted that it was a representation upon which the defendants were entitled to rely, it is only a statement that by means of the plaintiff's connection with the Dublin Theatre he had been able to reduce the expenses of the ensuing season above 200*l.* a week, and not a representation that a permanent annual saving of 200*l.* a week might be made in the expenses of the theatre. With respect to the exhibits (G.) and (H.), they were written also prior to the treaty for the lease. They do, indeed, represent that a reduction of expenditure, to the amount 7,105*l.* 5*s.* 7*d.* had occurred in the season of 1820-1821, this being the season to which the plaintiff refers in the exhibit (A.) and thus establishing the truth of the statement in that letter that, by his connection with the Dublin Theatre, he had been able to reduce the expenses of the ensuing season above 200*l.* a week: but so far from representing that such a deduction is always to be expected, the letter (F.) which incloses these exhibits, has this passage, speaking of the season 1821-1822:—"The present saving per week is 27*l.* and a fraction, and, the usual number of weeks being forty-four, I need not point out to you the saving of each season in future."

It may be observed that the exhibits (G) and (H) were furnished by Mr. Brandon, and were mere abstracts of the accounts kept by him, and which were accessible to all parties, and neither contained nor professed to contain any personal representations from the plaintiff. In exhibit (E), which is a letter written by the plaintiff to Mr. Surman, dated the 24th of May, 1824, and which was communicated to Mr. Harrison, on the part of the defendants, the plaintiff states: "It must be by gradual reduction of the large salaries [\*124] that our great saving must be made; I have been through the list of servants, &c. and I think some reduction may be made, but of trifling amount in comparison with performers' salaries." It is plain that it was by a saving in the performers' salaries, that the plaintiff's connection with the Dublin Theatre enabled him to reduce the expenses 200*l.* a week, in the year 1820-

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1821. In the exhibit (A) before referred to, he assigns, as a reason for that reduction, that, by keeping a theatrical force at Dublin ready, at any time, to be transplanted, he could, of course, do with less stationary company at Convent Garden. Upon the whole, therefore, the defendants seem to me to have failed altogether, in the proof of their allegation that they were misled by the plaintiff's representations with respect to permanent saving in the expenses of the theatre. Mr. Harrison, in his evidence, states that the plaintiff repeatedly assured him that the theatre had made profits to the extent of 10,000*l.*, in each of the years, 1819, 1820 and 1820–1821, and, that in consequence thereof, 20,000*l.* or thereabouts, of the old debt of the theatre had been paid off, and very little new debt contracted. If Mr. Harrison's memory in this respect is to be considered as correct, it is not and cannot be denied that the plaintiff is guilty of great misrepresentation; for, in the season of 1819–1820, there was no profit, but great loss; and, although it be true that about 20,000*l.* of the debt was paid off, in the two seasons, and comparatively little new debt contracted, yet it was so paid off, not by profits only, but by sale of boxes, which produced 10,000*l.*, and paid off a debt of 12,000*l.* Upon this point it is first to be observed that the defendants, who in their answers enumerate the other alleged misrepresentations of which they complain, do \*not, in their answers, take any notice of a misrepresentation in this [\*125] respect; and this, being more clear and tangible than any other alleged misrepresentation which they have enumerated, it is not probable, if it had taken place, that either Mr. Harrison would have omitted to mention it to them, or that they would have omitted to state it in their answers.

It is next to be observed that it would be very strange that a misrepresentation should be made which is directly contrary to the facts as they appeared upon the face of Mr. Brandon's accounts, which were equally open to all parties, and must be considered as equally known to all. It is further to be observed that the exhibits (G.) and (H.) before referred to, which contain Mr. Brandon's statement of the accounts of these seasons, and which were sent, by the plaintiff, to Mr. Harrison himself, only two months before, do, in effect, represent the season 1819–1820 as a losing season to a great amount, instead of a profitable season to the extent of 10,000*l.* The total amount of the receipts of that season are there stated at 55,833*l.* 1*s.*, and the expenditure, at 41,078*l.* 4*s.*, not including either tradesmen's bills or regular annual payments, which may be estimated, together, at least at 20,000*l.*, making together an excess of expenditure, beyond the receipts, of more than 6,000*l.* It may be observed also that in the letter (F.) which incloses the exhibits (G.) and (H.) Mr. Harrison is informed that the plaintiff is using every means he can to get the leases of the boxes settled, that the debts of Mr. Copeland, &c., due before August, 1818, may be, as soon as possible, discharged; thus distinctly informing Mr. Harrison that the debts to be paid off were to be discharged not out of the \*profits merely, as he supposes the plaintiff to have represented, but by [\*126] the application of the price of boxes also.

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From all these circumstances I am judicially bound to come to the conclusion that Mr. Harrison has misapprehended the statements made to him by the plaintiff.

On the part of the defendants, some other minor points of alleged misrepresentations were urged, which appear to have arisen from the different sense applied to the term, "profits of the concern," by the plaintiff and the defendants, and to which I do not think it necessary to refer more particularly. The plaintiff very properly, as it appears to me, treated the extinction of debt as profit.

The defendants next charge the plaintiff with a concealment of a transaction of his father, in which he joined, in respect to the moiety of a box sold by his father to the late Sir. Ed. Antrobus. It appears that this box was let, for alternate weeks, to his R. H. the Duke of Gloucester, at an annual rent of 210*l*. In the month of September, 1817, the plaintiff and his father assigned the other moiety of this box, to the late Sir Ed. Antrobus, for a sum of 2,625*l*., the whole of which was received by the father. This sale was not communicated to the other proprietors of the theatre; but it was represented to them that the moiety of the box was let to Sir E. Antrobus; for a term of twenty-one years, at the same annual rent of 210*l*. which was paid by the Duke of Gloucester; and,

during the life of Mr. Harris, the father, he accounted with the other [\*127] proprietors for this rent of 210*l*. as if paid by \*Sir E. Antrobus. Since

the death of his father the plaintiff has in like manner accounted with the other proprietors for the rent of 210*l*. as if paid by Sir E. Antrobus: and, on the occasion of the agreement between the plaintiff and the defendants for the lease in question, the plaintiff continued to represent the box as let to Sir E. Antrobus at this rent of 210*l*.; and it was a part of his agreement with the defendants that this rent, together with certain other rents payable to the proprietors of the theatre, amounting together to 1,360*l*. a year, should be received by the plaintiff in the manner hereinbefore stated. Since the agreements, the defendants have learnt the truth of the case from Sir E. Antrobus; and they now insist upon this transaction, as a reason for their being relieved from the lease. The concealment of the real nature of this transaction was extremely incorrect; although it was the same thing to the other proprietors as if the box had been actually let to Sir E. Antrobus at the 210*l*. a year. Upon referring to the table of annuities, it appears that an annuity of 210*l*. for twenty one years, computing interest at five per cent. is worth, in present money, 2,692*l*. 7*s*. Sir E. Antrobus paid only 2,625*l*. 2*s*., so that Mr. Harris, the father, in effect, took upon himself to account, with the other proprietors, for an annuity of 210*l*. for twenty-one years, without having received quite the full value for this undertaking; and his half of the property of the theatre was as good a security to the other proprietors, as if Sir E. Antrobus had undertaken to pay the 210*l*. a year. It was, however, the duty of the father and the plaintiff to have

disclosed the truth to the other proprietors, and to have given them an [\*128] option of receiving, either their proportions of the 2,625*l*., or \*their proportions of the 210*l*. a year; and, if the plaintiff had been well ad-

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vised, he would have taken the occasion of his treaty with the defendants to state the actual facts. But still the concealment cannot be made to bear upon the validity of the agreement for the lease. The plaintiff represented the box as let for 210*l.* a year; and, as far as it regards the defendants, it is to be considered as let at that sum, the plaintiff being bound to account with his co-proprietors for that rent: and, his interest in the theatre being a full security for the payment of it, and unless the defendants can show that their interests as lessees are prejudiced by that concealment, it must be indifferent to the defendants whether the 210*l.* a year is accounted for by the plaintiff, or by Sir E. Antrobus. If the defendants prefer their proportion of the price to their proportion of the rent, there is nothing in the agreement to prejudice that question.

The defendants next charged that, on the 28th of September, 1820, Mr. Harris, the elder, assigned a rent of 450*l.* which was and is payable for Lady Holland's box, to Messrs. Stevenson & Co. the bankers, by way of security for a sum of 6,000*l.* which was due from the proprietors of the theatre, and for a further sum of 4,940*l.* which was due from himself, individually; and that this transaction was also concealed from them, and forms another reason why they are entitled to be relieved from the agreement in question. Upon reference to the books of account of the theatre, there appear to be entries which manifest that this rent of 450*l.* was paid to Messrs. Stevenson & Co.; and if the defendants did not actually know the reason why it was paid, they had thus sufficient notice of the \*transaction to put persons of ordinary [\*129] prudence upon an inquiry, which would have given them full information; and it is their own fault if they failed to make that inquiry. With respect to the security to Messrs. Stevenson & Co. extending not only to the debt due from the theatre, but to a private debt of Mr. Harris, it is to be observed that, as far as regards Mr. Harris' private debt, it can affect only his share of the theatre, and is the same thing as if he had given a security for his private debt by a distinct deed.

The defendants, in their answers, made another charge with respect to the alleged concealment of two silver tickets for admission, granted by Mr. Harris, the father, to the late Mr. Coutts. It appears, upon this evidence, that, during the whole time the defendants were interested in the theatre, persons were constantly admitted with these tickets, and that they were regularly entered in the nightly accounts; and this charge was abandoned at the bar.

The result of my opinion upon all the facts of the case, is, that the plaintiff is entitled to a decree for a specific performance of this agreement, as between the plaintiff and the defendants Kemble, Willett and Forbes; and I must refer it to the master to settle a proper deed, accordingly, having regard to the circumstance that Mr. Const, not being bound by the agreement, his interest cannot be affected by it: and the master must appoint a new trustee in the place of Mr. Harrison. The defendant Trotter, who is only made a party in his character of executor of Mr. White, was not a necessary party to this suit: and the bill must be dismissed, as against him, as well as Mr. Const,

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1827.—*Harris v. Kemble*.

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[\*130] with costs. The \*defendant Harrison, as trustee under the intended deed, was a necessary party to this suit; and the costs, as to him, must be governed by the principle which applies to the general costs of the suit. Let the defendant, Harrison's costs be taxed and paid by the plaintiff; and let the plaintiff's costs also be taxed, and, together with the costs to be paid by him to the defendant Harrison, be paid by the defendants Kemble, Willett and Forbes: and let an account be taken of what has accrued due from the defendants, by way of rent, under the agreement: and of what, since the agreement, has been paid by the defendants in respect of the debts of the theatre pursuant thereto; and reserve the consideration of further directions and costs until after the master shall have made his report.[1]

[1] Vide *Scott v. Harrison*, ante 13; *Fellows v. Gwydyr*, ante 63; *Maddesford v. Austwick*, ante 69.

END OF PART I.

## CASES IN CHANCERY

BEFORE

## THE VICE-CHANCELLOR.

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\*NEWDIGATE V. NEWDIGATE.

[\*131]

1826. 25th November.—*Will.—Construction.—Timber.*

Tenant for life, unimpeachable of waste, except in the park, demesne lands and woods adjoining the capital messuage, there being no woods of that description, cannot cut timber in any of the woods that are either an ornament or shelter to the messuage.

SIR Roger Newdigate devised all his estates in the county of Warwick to the defendant, for his life, without impeachment of waste, except the timber growing in the park, avenues, demesne lands and woods adjoining to the capital messuage called Arbury.

There were no woods adjoining to the capital messuage; but there were some adjoining the park, and one about 290 yards distant from it. The defendant having cut timber in these woods, and in other places which the plaintiffs, who were the tenants for life and in tail in remainder, conceived were included in the exception, the bill was filed for an injunction to restrain him from cutting down timber trees growing in the park, avenues, demesne lands and woods \*adjoining to the capital messuage, and timber trees growing [\*132] upon the estate, which had been planted or were growing there for the protection or shelter or ornaments of the mansion house, or of the gardens, pleasure grounds or buildings thereunto adjoining.

Mr. *Shadwell* and Mr. *Jemmett*, for the plaintiffs:—As there are no woods that exactly answer the description in the will, the only way to construe the exception is, to say that it relates to timber in the park, the demesne lands, and in all the woods which have avenues in them, or which contribute to the ornament or protection of the park.

Mr. *Sugden* and Mr. *Finch*, for the defendant:—The only construction that can be put upon the expression “woods adjoining to the capital messuage” is, woods growing in the demesne lands. The protection of the avenues cannot be extended to woods in which the avenues are; for, where the testator means to protect the woods, he mentions them by their proper name, and where he means avenues, he calls them so.

1826 — *Richardson v. Miller.*

The VICE-CHANCELLOR:—This restriction is plainly intended for the protection of the residence in the testator's capital mansion at Arbury, and it extends, in terms, not only to timber in the park, avenues and demesne lands, but to timber growing in woods adjoining to the mansion house; by which is meant, therefore, some timber which grows neither in the park, avenues or demesne lands. The term "adjoining" is indeed vague; but it must [\*133] receive a construction from the apparent purpose of \*the testator, and is to be understood of woods so adjoining to the mansion house as to contribute to its comfort or pleasure; and in that sense it will afford the same protection to the mansion house as the rules of a court of equity would have extended to it if the restriction had been omitted; and certainly the testator did not mean by this exception to enlarge the rights of the tenant for life. Declare, therefore, that this exception extends to all woods so adjoining to the capital messuage of Arbury, as to serve for ornament or shelter to it.[1]

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RICHARDSON V. MILLER.

1826, 4th December.—*Infant.*—*Next friend.*

A suit being instituted on behalf of infants by a solicitor wholly unconnected with the family, it was, on the motion of the defendant, referred to the master to inquire whether it would be for the infants' benefit that the suit should be prosecuted, the defendant undertaking to render to the master the accounts prayed for by the bill.

THIS was a suit, by infants, against their father's executor, for the usual accounts. The next friend of the plaintiffs was a solicitor wholly unconnected with the family. Mr. Hart and Mr. Barber, for the defendant, moved that the next friend might be restrained from further proceeding in the suit.

Mr. Wakefield, contra, said that any one might, by the practice of the court, institute a suit on behalf of infants.

The Vice-Chancellor referred it to the master to inquire whether it would be for the benefit of the infant plaintiffs that this suit should be prosecuted: the defendant, the executor, undertaking, by his counsel, to \*render to the master, upon his affidavit, an account of the testator's assets, and of the balance in respect thereof in the defendant's hands; and the master to be at liberty to state any circumstances specially to the court.[2]

[1] As to injunction to stay waste or trespass. See Amer. Ch. Digest. Injunction II. XVII.

[2] Any person may bring a suit for an infant, without his knowledge or consent as his next friend, because he does it at his peril. The only check upon this general license is, that on a proper application the court will refer it to a master to inquire whether such suit is for the benefit of the infant; and if the master reports that it is not for his benefit, or that it is not for his interest that it should be prosecuted by the particular person who has instituted the suit, the court will order the proceedings to be stayed. *Fulton v. Roosevelt*, 1 Paige, 178. *Garr v. Drake*, 2 Johns. Ch. Rep. 542. *Peyton v. Bond*, post 390. *Attorney General v. Corporation of Cashel, Sausse & Co.* 334. *Nalder v. Hawkins*, 2 Myl. & K. 243. *St. John v. Earl of Beesborough*, 1 Hog. 41.

1826.—*Haggett v. Welsh.*

HAGGETT V. WELSH.

1826, 19th December.—*Contempt.—Arbitration.*

Although a reference to arbitration is made under an order of the court, either party may revoke the authority of the arbitrator before the award is made; but it is a high contempt so to do.

In this cause an order had been made, by consent, referring the cause to arbitration; but there was no agreement in the order that the submission should be made a rule of any court, nor that the award should be made a rule of the court of chancery. Pending the reference, one of the defendants gave notice to the arbitrator that he revoked his authority; but the arbitrator proceeded, and made his award. The other defendant, in whose favor the award was made, now moved that the award might be made a rule of this court, and that the court would direct the payment of the sum awarded to him.

The plaintiff made a cross motion that he might be at liberty to proceed with his cause, considering the award as a nullity, by reason of the revocation of the authority of the arbitrator by one of the parties.

Mr. Beames supported the original motion.

Mr. Pepys supported the cross motion, and cited *Vynior's case*,<sup>(a)</sup> *Barker v. Lees*,<sup>(b)</sup> *Hide v. Petit*,<sup>(c)</sup> *\*Marsh v. Bulteel*,<sup>(d)</sup> *Milne v. Gratrix*,<sup>(e)</sup> *King v. Joseph*,<sup>(f)</sup> *Harcourt v. Ramsbottom*,<sup>(g)</sup> and *Clapham v. Higham*.<sup>(h)</sup> [\*135]

Mr. Sugden, and Mr. Campbell opposed the original motion, and cited *Doe v. Brown*.<sup>(i)</sup>

THE VICE-CHANCELLOR:—Where an order of reference is made by any court, it is not necessary, to give the court authority with respect to the award, either that the submission should be made a rule of court, or that the award should be made a rule of court. It is a necessary part of the agreement that the submission should be made a rule of court, where the reference is under the statute, or where the reference is made at nisi prius, or by a judge's order. But, where the reference is made under the order of any court, there, *ipso facto*, disobedience to the award incurs a contempt of that court, and the court will lend its aid to enforce the award. The first part of the defendant's motion is therefore superfluous; and I cannot act upon the second part, being of opinion that, notwithstanding the reference is made under an order of court, the authority of the arbitrator may, at any time before the award is made, be revoked by either of the parties, and that the arbitrator had, consequently, in this case, no power to make any award. It is to be observed, however, that this reference, taking place under an order of the court, the revocation of the authority of the arbitrator is a high contempt of the court; and, when, a proper application is made, will be dealt with accordingly. The motion of the [\*136]

(a) 8 Co. 81.

(b) 2 Keb. 64.

(c) 1 Ch. Ca. 185; 2 Freem. 133; 1 Eq. Ab. 49.

(d) 5 B. & A. 507.

(e) 7 East, 608.

(f) 5 Taunt. 502.

(g) 1 J. & W. 505.

(h) 1 Bing. 87.

(i) 5 B. & C. 384.



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 1827.—*Jones v. Totty.*


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plaintiff is misconceived. This cause is gone out of the paper; and, in order to be heard, must be again set down, and his proper application will be, that he may be at liberty again to set down his cause, which under the circumstances, the registrar, I apprehend, will not permit without the special order of the court.[1]

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### JONES v. TOTTY.

1827,—17th January.—*Partition.—Exceptions.—Practice.*

Exceptions will not lie to the return of commissioners in a suit for partition, on the ground of inequality of value in the lots. In all cases of improper conduct in the commissioners, a motion must be made to suppress the return.

In this case exceptions were taken to a return made by the commissioners under a decree for partition, on the ground of unequal value in the three allotments made by them. The three tenants in common had taken by lot; but it was alleged, by the exceptant, that management had been used, by the commissioners, in the drawing of the lots, so as to throw upon him the lot which was of inferior value; and a motion to suppress the return on that account, now came on to be heard with the exceptions.

Mr. Sugden and Mr. Daniel, in support of the exceptions, cited *Watson v. Duke of Northumberland*.(a)

Mr. Heald, Mr. Horne, Mr. Rose and Mr. Smith, appeared in support of the return.

The Vice-Chancellor, referring to the case of *Corbet v. Davenant*,(b) [\*137] ruled that exceptions would not lie to such a return; and that the motion to suppress the return was the proper course. Upon the motion, the Vice-Chancellor observed that the charge of management on the part of the commissioners wholly failed, and that, with respect to comparative value, all that could be stated was, that there were conflicting opinions by different surveyors; and, considering that the three commissioners here were named by the three different parties, and were, therefore, judges of their own choice, the principles which applied to arbitrators were properly applicable to them; and for that reason, he should have hesitated to suppress the return, even if he had been satisfied that the commissioners had erred in their judgment as to value.

Motion refused, with costs.

(a) 11 Ves. 153.

(b) 2 Bro. C. C. 252.

[1] Although it be agreed that the submission be made a rule of court, yet until actually made so, it is revocable, and the party by revoking is not placed in contempt. *Frets v. Frets*, 1 Cow. 335.

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1827.—*Courtney v. Ferrers.*

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## COURTNEY V. FERRERS.

1827, 22d February.—*Will.—Construction.—Policy of Assurance.—Bonus.*

A policy of insurance for 3,000*l.* on A.'s life was assigned to trustees, and, by a deed of even date, trusts were declared of it by the description of "the sum of 3,000*l.* for which A.'s life was insured," and power was given to B. to dispose of it by will. B., after reciting the settlement, bequeathed 1,000*l.*, part of the sum of 3,000*l.*, to A., and the remaining sum of 2,000*l.* to C. At A.'s death, 9,000*l.* was received under the policy: Held that the whole fruits of the policy were subject to the trusts of the settlement, and passed by the bequests to A. and C. in proportion to their legacies.

By an indenture, dated the 23d of April, 1787, after reciting that the Rev. E. Ferrers had effected an assurance on his life, for 3,000*l.*, in the Equitable Assurance Office, that gentleman assigned, to Sir Nash Grose and George Rose, Esq, the policy of \*assurance, and all sums of money, [\*138] benefits and advantages to arise, accrue or become due or payable upon or by virtue of it, in any manner howsoever.

By the settlement on the marriage of Mr. Ferrers with Miss C. M. Young, bearing even date with the assignment, after reciting a lease, granted in 1786, by the Bishop of Ferns, to Miss Young, of certain hereditaments in the county of Wexford, for twenty-one years; that Miss Young had transferred 2,100*l.*, part of a sum of 3,800*l.*, three per cent consols, to Sir N. Grose and G. Rose; that under the trusts of certain indentures, 2,000*l.* was to be raised and paid to such persons as Mr. Ferrers should, by his will, appoint, and, in default of appointment, to his executors or administrators; that, upon the treaty for the marriage, it had been agreed that the 2,100*l.* consols should remain vested in, and the lease be assigned to Sir N. Grose and G. Rose, upon the trusts after mentioned; that Mr. Ferrers had lately made an insurance on his life, in the Equitable Assurance Office, for 3,000*l.*, which he had assigned to the same persons, and was to be paid to them upon the trusts after mentioned, and which sum of 3,000*l.*, together with the 2,000*l.*, should be received and disposed of by them in the manner after expressed; Miss Young assigned the leasehold premises to Sir N. Grose and G. Rose, for the remainder of the term of twenty-one years: and it was declared that the 2,100*l.* consols and the leasehold premises were transferred and assigned to them upon trust, during the joint lives of Mr. Ferrers and Miss Young, out of the rents and dividends, to pay to Miss Young the yearly sum of 100*l.* for her separate use, and, in case of Mr. Ferrers omitting to do it, \*according to his covenant [\*139] therein contained, (a) to keep insured, at the equitable or some other insurance office, the sum of 3,000*l.* upon Mr. Ferrer's life, and to renew the leases of the leasehold premises when they thought proper, and to pay the rest of the rents and dividends to Mr. Ferrers for his life, and, after his decease, to Miss Young for her life, and, after the decease of the survivor, in trust for

(a) On referring to the settlement, it appeared that no such covenant was contained in it.

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 1827.—*Courtney v. Ferrers.*


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the children of the marriage, as Mr. Ferrers and Miss Young, or the survivor of them, should appoint: and it was declared that, after the decease of Mr. Ferrers, the trustees should stand possessed of the 3,000*l.* upon the trusts before expressed concerning the leasehold premises and the 2,100*l.* consols; and Mr. Ferrers covenanted with the trustees to appoint, by his will, the 2,000*l.* to be paid to the trustees upon the same trusts.

Mrs. Ferrers afterwards died, leaving one daughter only. The daughter attained twenty-one on the 24th October 1809; and in the November following, Mr. Ferrers released to her his life interest in the 2,100*l.* consols.

By the settlement on the marriage of the plaintiff with Miss Ferrers, dated the 23d of January, 1810, after fully reciting the former settlement, and that it had been agreed that Mr. Ferrers should, in exercise of the power given to him by the settlement of the 23d of April, 1787, appoint the leasehold premises, and the 2,000*l.* and 3,000*l.* to his daughter, to become immediately [\*140] interests vested in her; but, as to the leasehold \*premises, to be subject to his life interest in the same: and that the leasehold premises and the 2,000*l.* and 3,000*l.* should be settled upon the trusts thereafter expressed; and that the sum of 1,000*l.* should be raised and paid to the plaintiff for his own use out of the 2,100*l.* consols, and that the remainder should be retained by Miss Ferrers for her separate use: Mr. Ferrers appointed the leasehold premises (subject to his life interest therein,) and the 2,000*l.* and 3,000*l.*, to his daughter, her executors, administrators and assigns; and Miss Ferrers assigned to the trustees of her settlement the 2,000*l.* and all that the sum of 3,000*l.* assured by the before mentioned instrument or policy of assurance, to be paid to the said Sir Nash Grose and George Rose, their executors, administrators, and assigns, upon the decease of the said Edmund Ferrers, as thereinbefore was mentioned; and also all that the covenant and agreement entered into, by the said Edmund Ferrers, in the said indenture of the 23d day of April, 1787, for paying the premiums and other expenses attending the said insurance, and the full benefit and advantage of the said covenant and agreement, and all the right, title, interest, property, possibility, claim and demand whatsoever, of her the said Caroline Mary Ferrers, in, to and upon the same premises; to hold the said sums of 2,000*l.* and 3,000*l.*, and all the said covenants and agreements, and all and singular other the premises lastly thereby assigned, unto the trustees upon the trusts thereafter declared: and she appointed the same trustees to be her attorneys, to demand and receive the said sums of 2,000*l.* and 3,000*l.*; and it was thereby declared that the trustees should stand possessed of the 2,000*l.* and 3,000*l.* upon trust, to lay [\*141] out and invest the same upon government or real securities, and pay \*the interest and dividends of those securities, and the rents of the leasehold premises, after Mr. Ferrers' decease, to the plaintiff for his life, and, after his decease, to Miss Ferrers for her life, and, after the decease of the survivor, to the children of the marriage, as therein mentioned; and if there should be no such child, and Miss Ferrers should die in the life time of the plaintiff then

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in trust to assign the trust premises to such persons as Miss Ferrers should, by will, appoint, and in default of such appointment, in trust for her next of kin at her decease, under the statute of distribution, as if she had died unmarried; and the trustees were thereby empowered to sell the leasehold premises, and to lay out the money arising from such sale upon government or real securities, and to stand possessed of those securities upon the same trusts as were thereinbefore expressed concerning the 2,000*l.* and 3,000*l.*

Mrs. Courtney, by her will, dated the 23d of July, 1810, and which was expressed to be made in exercise of the power given to her by her settlement, gave the leaseholds, (subject to her father's life interest therein,) and the 2,000*l.* to the plaintiff, and then proceeded as follows:

"I give and bequeath to my said father, to be disposed of by deed or will as he shall think fit, the sum of 1,000*l.*, part of the sum of 3,000*l.*, which by the said indenture of settlement, made on my said marriage, my said father covenants to keep insured on his life, and which is subject to the trusts of the said settlement. The remaining sum of 2,000*l.* I give and bequeath equally between my two uncles, Thomas Ferrers, Esq. and the Rev. John Ferrers; and, in case of the death of both or either of my said uncles in my life-time, leaving \*any child or children them or him surviving, then I [\*142] give and bequeath the shares or share of them or him so dying unto and equally between their or his respective child or children. And as to all the rest and residue of my property over which I have any power of disposition, I give and bequeath the same unto my said husband; and I appoint him sole executor of this my last will."

Mrs. Courtney died in 1811, without issue. Mr. Ferrers died in 1825. His brothers, Thomas and John, were his personal representatives.

Owing to the additions which, according to the practice of the equitable assurance office, had been made, from time to time, to the sum insured, upwards of 9,000*l.* was received under the policy upon Mr. Ferrers' decease.

The question in the cause was, whether the whole of the sum received under the policy, or only the 3,000*l.* was subject to the trusts of the settlement, and passed by the bequests to the testatrix's father and uncles?

Mr. *Horne* and Mr. *Bickersteth*, for the plaintiff:—There can be no doubt that, by the assignment, the policy, and all sums to be recovered under it, were vested in the trustees. It is impossible to use stronger words for that purpose than those contained in that instrument. The whole fruits of the policy must, therefore, be held to be included in the first settlement. If Mr. Ferrers ever thought he was entitled to any additions that had been or might be made to the sum insured, he ought to have asserted his right before he executed the second settlement; but he never made any such claim; and, as the whole fund passed by the description of \*3,000*l.* in the former settle- [\*143] ment, it must be held to pass by that description in the latter. Mrs. Courtney, therefore, had power to dispose by will of the whole sum which might be payable under the policy. But it cannot be contended that her uncles,

1827.—*Courtney v. Ferrers.*

under the bequest to them of the remaining sum of 2,000*l.* are entitled to the residue of the fund ; for, in that case, there would be nothing upon which the residuary bequest could operate, as she had no residue, except the surplus of the moneys payable upon the policy.

Mr. *Sugden* and Mr. *Loraine*, for the defendants *Thomas* and *John Ferrers* :—The trustees were not bound, by the settlement, to insure Mr. *Ferris*' life in the equitable insurance office, but were at liberty to insure it in any other office. This is material, for in some of the offices no bonuses are given. Throughout the whole of each of the settlements nothing is mentioned but the sum of 3,000*l.* None of the parties seems to have supposed that any addition would ever be made to the sum insured. In the interval between the two settlements considerable additions had been made to it ; but it is not the sum to be recovered under the policy, but the 3,000*l.*, which is the subject of the second as well as of the first settlement. The circumstance of the 2,000*l.*, which could neither be increased nor diminished, being coupled with and put on the same footing as the 3,000*l.*, furnishes an additional argument in favor of the defendants. If then the trusts are declared of 3,000 only, the remainder of the fund must be a resulting trust for the personal representative of Mr.

*Ferrers. Norris v. Harrison.*(*b*)

[\*144] \*Should, however, the court be of opinion that the 3,000*l.* represented the whole fund then Mrs. *Courtney* had power, under her settlement, to dispose of all the moneys to be received under the policy, and the defendants will be entitled to the whole of the moneys subject to the plaintiff's life interest. The plaintiff is estopped from denying this ; for if he says that the whole fund passed in the settlement by the description of 3,000*l.*, he cannot contend that it did not pass by the same description in this will. According to the argument for the plaintiff, if Mrs. *Courtney* had bequeathed the whole 3,000*l.* to her uncles, the whole fund would have passed ; the consequence is the same when it is disposed of in distinct sums.

If Mrs. *Courtney* had meant to give to her father the whole of the fund except the 2,000*l.*, which she had bequeathed to her uncles, she would not have given him the 1,000*l.* expressly, but would have given the 2,000*l.* to her uncles, and the remainder to her father.

Admitting that there was no residue for the will to operate upon except the surplus money payable on the policy, the residuary bequest could not have the effect of cutting down a prior gift.

The VICE-CHANCELLOR :—The defendants, in their character of personal representatives of the father, can have no title to any part of the money recovered from the equitable assurance office. All benefit of the policy was assigned to the trustees upon the trusts expressed in the settlement, which bore even date with the assignment : and, according to the trusts expressed [\*145] in the settlement, the only child of the marriage became absolutely \*en-

1837.—*Courtney v. Ferrers.*

titled to all moneys which should, by virtue of the policy, be received from the insurance office, subject only to the father's life interest. When the second settlement was made in contemplation of the daughter's marriage, it had not occurred to the parties that, according to the rules of the equitable assurance office, a much larger sum would be payable under the policy than the original sum insured, and, in treating, therefore, of the daughter's interest under the father's settlement, they describe it as a sum of 3,000*l.* But it is plain, whatever was the language used, that it was the intention of the parties to comprise, in the daughter's settlement, her whole interest under the policy of assurance; and the effect must be the same as if more correct terms of description had been used in the settlement. As the sum of 3,000*l.* was mentioned in the settlement as descriptive of the daughter's interest in the policy of assurance, so the daughter uses the same term, as descriptive of the same interest, in her will; and, when she divides that interest into thirds by the gift of three equal sums of 1,000*l.* each, the words will pass to each legatee an equal third of the whole benefit of the policy. The defendants, the uncles, will, therefore, take the whole sum of 9,270*l.* subject to the plaintiff's life interest: they take each one third as the immediate legatees of the daughter, and the other third they take as personal representatives of the father, who was the other legatee.[1]

[1] "The plaintiff was entitled, together with his brother, to a contingent interest in a legacy of 2,000*l.*, for mingpart of a sum of 20,000*l.* which according to the directions of the will was to be invested in three per cent consolidated annuities within three months after the testator's decease. What the plaintiff was entitled to was not literally a contingent legacy of the sum of 1,000*l.* but a share of the stock in which the whole 20,000*l.* had, in pursuance of the will been invested corresponding to the value of this sum of 1,000*l.* Being so entitled, and being desirous of selling his contingent reversionary interest, he published these particulars of sale." "According to these particulars of sale he offered to sell his interest in 1,000*l.* principal money invested in three per cent consols: the right therefore which he represented himself to be entitled to, was not to sterling money but to the investment. The defendant having become the purchaser of this interest at the sale, the plaintiff executed an indenture which recites, &c."—"Hitherto there appears to be no ambiguity, but when we come to the assignment, instead of assigning as might be expected from the recitals, all that legacy of 1,000*l.* so invested in stock, he assigns all that sum of 1,000*l.* sterling, being one moiety of the said legacy or sum of 2,000*l.* bequeathed by the will. Now, notwithstanding this word sterling, which is the only word creating any ambiguity, considering that it is explained by the following words, which describe the 1,000*l.* sterling, as a moiety of the legacy bequeathed by the will, the impression upon my mind is, that the parties did mean the 1,000*l.* in its state of investment; and if that was meant the word *sterling* is not of such importance as to outweigh the other circumstances by which the effect of the instrument is to be determined. I am of opinion therefore that the plaintiff is not entitled to the relief which he asks,"—(that is, to obtain the surplus value of the stock after deducting the 1,000*l.*)—"and that the bill must be dismissed; but there is so much ambiguity in the case, that I think it must be dismissed without costs." Lord Langdale, M. R., *Lucas v. Bond*, 2 Keen, 136.

1827.—*Leeds v. Cheetham.*

[\*146]

\*LEEDS v. CHEETHAM.

1827, 22d and 27th February.—*Landlord and tenant—Equity.*

A tenant has no equity to compel his landlord to expend money received from an insurance office, on the demised premises being burnt down, in rebuilding the premises, or to restrain the landlord from suing for the rent until the premises are rebuilt.

By indenture, dated the 25th of March, 1820, the defendant demised to the plaintiff a cotton factory, together with the steam boiler, steam engine, steam pipes and gearing thereunto belonging, for twenty-one years, at the yearly rent of 103*l.* 3*s.* 6*d.* : the plaintiff covenanted to pay the rent during the term, and to repair and keep repaired the inside of the cotton factory, and the out-buildings and offices thereto belonging, together with all fixtures, buildings, improvements and additions then or at any time during the continuance of the term erected or to be erected upon the premises, and also the steam boiler, steam engine, steam pipes and gearing, and all the apparatus thereto belonging, so long as the same would last or could be rendered workable by repair. But when the same or any part thereof were quite worn out by long use, and were no longer workable, the defendant was to replace them with new ones at his own expense, during the last fourteen years of the term : and the defendant covenanted to maintain the out side brick-work, plastering, slating, tiling, and all other outer parts of the premises, in good, substantial and tenantable repair, and at his expense during the last fourteen years of the term to replace or cause to be replaced the steam boiler, steam engine, pipes and gearing, and the apparatus thereunto respectively belonging, with good and substantial new ones of the same size and description, when and as they should respectively become incapable of further use by long service, and could be no longer

[\*147] rendered \*workable. There was no exception, in respect of accidents by fire, either in the covenant for payment of the rent, or in the covenant to repair.

On the 22d of June, 1825, the factory, buildings and premises were destroyed by fire.

After the lease was granted, the defendant insured the factory and buildings for 500*l.*, the steam engine for 100*l.* the engine house for 60*l.* and the gearing for 40*l.* ; so that the total amount of the sums insured was 700*l.* : and, shortly after the fire, he received that sum from the insurance office.

The bill alleged that the 700*l.*, together with the old materials, which were of the value of 350*l.*, were more than sufficient to rebuild and reinstate the factory, buildings, steam boiler, steam engine, pipes, gearing and premises ; that the plaintiff was desirous that they should be rebuilt and restored ; and that he was advised that he was entitled to have the 700*l.* applied for that purpose ; but that the defendant refused so to apply that sum, and that the repairs he had done to the outside were colorable only, and so ineffectual that the walls would not support the machinery : that nevertheless he insisted on pay-

1827.—*Leeds v. Cheetham.*

ment, by the plaintiff, of the whole of the rent, and had commenced an action against the plaintiff for a year's rent, ending on the 24th of June, 1826. The bill prayed that it might be declared that the defendant was bound to lay out and apply the 700*l.*, or a competent part thereof, together with the old materials, in and towards the rebuilding and reinstating of the factory, buildings and premises, the steam boiler, steam engine, pipes \*and [\*148] gearing thereof; and that he might be decreed forthwith to lay out and apply the same accordingly, the plaintiff offering to make good, out of his own moneys, what the 700*l.* and the old materials should be insufficient for the purposes aforesaid, to such extent as he should be deemed liable thereto; and that it might also be declared that the plaintiff was not bound to pay the rent during such time as the factory and premises, and steam boiler, steam engine and other machinery should continue unbuilt and unrestored; and that he might be discharged therefrom accordingly; and that, in the mean time, the defendant might be restrained from further proceeding in the action.

The defendant demurred to the bill, for want of equity.

Mr. *Spence*, in support of the bill, relied upon *Brown v. Quilter*. (a) He also referred to the comments, made upon that case, by Macdonald, C. B. in *Hare v. Groves*, (b) and to *Holtzapffel v. Baker*; (c) and said that the consequence of refusing the relief sought by the bill would be, that as often as the defendant brought an action against the plaintiff for the rent, the plaintiff would bring a cross action against the defendant for not repairing the outside of the buildings, which Lord Northington, C. said would be very vexatious and endless, and introduce a kind of equity. (d)

Mr. *Cooper*, in support of the demurrer, said that if the equity contended for were to prevail, it would \*encourage tenants to let their [\*149] buildings get out of repair, and then set fire to them: that, if part only of the premises were destroyed by fire, it would be impossible to determine what part of the rent ought to be deducted until they were repaired; and he cited *Hare v. Groves* and *Holtzapffel v. Baker*, and particularly the following passage in the argument for the plaintiff in the last case: "As to the distinction where the landlord insured and received the value, it is extremely difficult to conceive how that distinct contract, merely for the advantage of the lessor, with which the lessee has no concern, can affect the right as between them."

The VICE-CHANCELLOR, after stating the substance of the bill, proceeded as follows:—To this bill the defendant has put in a general demurrer; and the question is, whether there is any ground of equity to support the bill. There being in the lease no exception as to the case of accident by fire, the plaintiff at law continues bound to pay his rent; [1] he continues bound also, by his covenant, to keep in repair the inside work of the factory, the steam engine,

(a) Amb. 619.

(b) 3 Anst. 687.

(c) 18 Ves. 115.

(d) Amb. 621.

[1] Vide *Gates v. Green*, 4 Paige, 355.



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1827.—Leeds v. Cheetham.

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and the other apparatus, and all the out buildings and fixtures which were on the premises. On the other hand, the defendant, for want of the exception as to accident by fire, continues bound by his covenant to repair the outer part of the buildings, and also by his covenant to replace the steam boiler and other apparatus during the last fourteen years of the term; and when, from long use, they are no longer workable, under these covenants, the defendant is bound to rebuild the factory, and to cover in the same with proper roofing and [\*150] slating or tiling; \*and the plaintiff is bound to rebuild the out-buildings, and to do all necessary works to complete the inside work of the factory when it is built and covered in by the defendant. And clearly, at law, the plaintiff, having covenanted to pay his rent during the whole continuance of the lease, is not entitled to any suspension of the rent during the time that will be occupied in the rebuilding and restoration of the premises.

It appears to me that, in this respect, equity must follow the law. The plaintiff might have provided in the lease for a suspension of the rent in the case of accident by fire; but, not having done so, a court of equity cannot supply that provision which he has omitted to make for himself; and it must be intended that the purpose of the parties was according to the legal effect of the contract. With respect to the equity which the plaintiff alleges to arise from the defendant's receipt of the insurance money, there is no satisfactory principle to support it. The defendant having so contracted with the plaintiff as to render himself liable to rebuild the outer work of the factory in case of accident by fire, has very prudently protected himself by insurance from the loss he would otherwise have sustained by such an accident. But upon what principle can it be that the plaintiff's situation is to be changed by that precaution on the part of the defendant, with which the plaintiff had nothing whatever to do? The plaintiff has sought his protection in the contract by the covenant which he has required from the defendant; and to those covenants must he alone resort.

In this case some embarrassment may arise from the singular cove- [\*151] nants as to the steam engine and other \*apparatus. The plaintiff has covenanted to keep them in repair so long as they can be continued in use by repair; and the defendant has covenanted to replace them with new articles of the same description, at some time during the last fourteen years of the lease, when they cease to be workable by repair. The literal effect of these mutual covenants is defeated by the fire. But the parties will, no doubt, have the good sense to arrange between themselves what justice requires in this case, without the necessity of resorting to cross actions of covenant. But, if not, the remedy is at law, and this court cannot interfere.

Demurrer allowed.

1827.—*Williams v. Broadhead.*

**WILLIAMS v. BROADHEAD.**

1827, 2d and 8th March.—*Practice.—Evidence.—Depositions.*

Office copies of depositions by living persons in a tithe suit in the exchequer may be read in a similar suit in this court against another defendant who makes the same defence, on production of office copies of the bill and answer in the former suit, without any order of this court for that purpose.

THIS was a tithe suit instituted by a vicar against an occupier of lands in the parish. The plaintiff had obtained a decree in a similar suit in the exchequer against another occupier. The defence made in both suits was, that the lands were discharged of tithes by having belonged to the abbot and convent of Westminster. The defendant had obtained, as of course, an order that the depositions of witnesses who were still living, which had been taken in the latter suit, might be read at the hearing of the former.

Mr. *Duckworth*, for the plaintiff, now moved to discharge that order for irregularity.

\*Mr. *Boteler*, for the defendant, referred to *Coke v. Fountain*; (a) [\*152] *Hand's Prac.* 114; *Bishop of Hereford v. Cooper*; (b) *Christian v. Wrenn*; (c) and *Goodenough v. Alway*. (d)

The VICE-CHANCELLOR:—This order has been obtained by the plaintiff under a misapprehension of the principles and practice of the court in such cases.

Where there is cause and cross-cause, there the order, which has been obtained here, is extremely useful; because it saves the necessity of examining the witnesses in both causes; and the depositions are read, without more, as if taken in both causes. But here the parties, not being the same in both causes, not the depositions themselves, which the court of exchequer will not part with, but office copies of the depositions are to be read, if at all, upon the principle that they are, in their nature, legal evidence, having regard to the subject of the two suits; and the plaintiff is entitled to read them as evidence, without any order, upon production of the office copy of the bill and answer, for the purpose of showing that the same points were in issue in the first cause. The order which has been obtained will not relieve the plaintiff from the necessity of the production of the office copies of the bill and answer and depositions, and, serving no purpose whatever, the order must be discharged, as improperly introduced upon the records of the court. [1]

(a) 1 Vern. 413.

(b) Bunb. 293.

(c) Ibid. 321.

(d) 2 Sim. & Stu. 481.

[1] Vide *Carrington v. Cornock*, 2 Sim. 567.

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 1827.—*Charrette v. Vause.*


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[\*153]

\*CHARRETTE v. VAUSE.

1827, 21st February.—*Annuity.—Sale of dividends.*

An assignment of 150*l.*, part of the dividends of a sum of stock to which the vendor was entitled for life, with a proviso that the purchaser should not receive any part of the dividends then growing due, but a proportionable part of the 150*l.*, is a grant of an annuity to that amount, and must be memorialized.

By an indenture, dated the 16th June, 1821, made between the Rev. John Vause, clerk, of the first part, John Kendall, gent. of the second part, and the defendant, John Nicholson, of the third part; after reciting an indenture of settlement of the 2d of April, 1800, so far as regarded the trusts thereby declared of 5,200*l.* Three per cent consolidated bank annuities therein mentioned, and that, under the trusts of the recited indenture, 12,800*l.* three per cent. consolidated bank annuities had been added to the 5,200*l.* like bank annuities, making together 18,000*l.*, three per cent consolidated bank annuities, which were then standing in the names of Edward Wilbraham Bootle, George Case, and Ralph Fisher, the younger, the trustees of the indenture of settlement, in the books of the governor and company of the bank of England, and to the dividends and annual produce of which the said John Vause was entitled, during his life, under or by virtue of the said indenture of settlement, free from any incumbrance whatsoever; and also reciting that the said John Kendall had then lately contracted and agreed with the said John Vause for the purchase of the annual sum of 150*l.*, part of the yearly dividends of the said 18,000*l.*, three per cent consolidated bank annuities, so vested in the names of the said trustees as aforesaid, for and during the natural life of the said John Vause, for the price or sum of 1,100*l.*, but no part of the said purchase money had been then paid, nor had any assignment of the said annual sum

[\*154] been made, pursuant to the said \*recited contract; and also reciting a policy of insurance, effected by the said John Kendall on the life of the said John Vause, in the European Life Insurance Office, for the sum of 1,300*l.*, and that the said John Kendall had contracted and agreed, with the defendant Nicholson, for the sale to him of the said annual sum of 150*l.*, during the natural life of the said John Vause, for the price or sum of 1,300*l.*, and had agreed with Nicholson to assign to him the said policy of insurance, upon his paying to the said John Kendall the premium paid by him to the said insurance office: it was by the said indenture witnessed that, in pursuance of the said recited contracts and agreements, and in consideration of 1,100*l.* by the direction of the said John Kendall paid by the said John Nicholson to the said John Vause, and of 200*l.*, making together 1,300*l.* to the said John Kendall also paid by the said John Nicholson, the said John Vause, with the consent and approbation of the said John Kendall, assigned, transferred and set over, and the said John Kendall ratified and confirmed unto the said John Nicholson, his executors, administrators and assigns, all that the clear yearly sum of 150*l.*,

1827.—*Charretie v. Vause.*

being part of the dividends arising from the said 18,000*l.*, three per cent consolidated bank annuities, standing in the names of the said trustees in the books of the governor and company of the bank of England as aforesaid, and all the right, interest, property, claim and demand whatsoever, at law and in equity, of the said John Vause, in, to and out of the said annual sum or yearly dividends of 150*l.*, and every part thereof, together with all powers, remedies and means whatsoever, requisite or necessary for suing for, recovering, receiving and giving effectual releases and discharges for the same: to hold, receive, take and enjoy the said annual \*sum of 150*l.*, of the said divi- [\*155]dends of the bank annuities, unto the said John Nicholson, his executors, administrators and assigns, thenceforth for and during the natural life of the said John Vause, to be paid and payable half yearly, when and as the said dividends should be payable at the bank of England, and the first half yearly payment thereof to be made at the next payment of dividends on the said bank annuities, at the bank of England, after the date of the said indenture, save and except that, as there would be only one month's interest, amounting to 12*l.* 10*s.* due to the said John Nicholson, in July then next, being the time when the said dividends would become payable, it was agreed that the said John Nicholson should receive such sum of 12*l.* 10*s.* at that time only, and afterwards should have, receive and take the whole of the said annual sum of 150*l.*, part of the said dividends of the said 18,000*l.*, three per cent consolidated bank annuities, by half yearly payments, as they should become due, as aforesaid: and the said John Vause thereby authorized and directed the said E. W. Bootle, George Case, and R. Fisher, the younger, or the survivors or survivor of them, or the executors or administrators of such survivor, or the trustees or trustee for the time being of the said recited indenture of settlement, from time to time, during the life of the said John Vause, to pay the said annual sum of 150*l.*, part of the dividends of the said 18,000*l.*, three per cent consolidated bank annuities, standing in the names of the said trustees as aforesaid, or otherwise to empower the said John Nicholson, his executors, administrators or assigns to receive the said annual sum when and as the said dividends should become due and payable: and the said John Vause did thereby covenant with the said John Nicholson that he had good \*right to assign [\*156] the 150*l.*, part of the dividends of the said 18,000*l.* bank annuities, unto the said John Nicholson, his executors, administrators and assigns, during the life of the said John Vause, in manner aforesaid; and that it should be lawful for the said J. Nicholson, his executors, administrators and assigns, from time to time, during the natural life of the said John Vause, to receive and take the said annual sum of 150*l.*, part of the dividends of the said 18,000*l.*, three per cent consolidated bank annuities, when and as the said dividends should become due and payable, the first payment of 12*l.* 10*s.* being the proportionable part of such annual sum as aforesaid, to become due and payable at the next payment of dividends on the said bank annuities, at the bank of England, after the date of the said indenture: and the said John Vause covenanted in the

1827.—*Charrette v. Vause.*

usual manner for further assigning and assuring the said annual sum, of 150*l.*, part of the said dividends, unto the said J. Nicholson, his executors, administrators and assigns, during the life of the said John Vause. And the indenture also contained an assignment, from the said John Kendall to the said J. Nicholson, of the said policy of assurance effected by him on the life of the said John Vause.

On a motion being made, in this cause, for payment of the dividends of the 18,000*l.* stock into court, the parties consented that the court should decide whether the above transaction was a sale of part of the dividends of the stock, or a grant of an annuity: in which latter case it was void for want of a memorial.

Mr. *Shadwell* and Mr. *Wilbraham*, for the defendant Nicholson :—  
[\*157] \*The question is, whether this is an assignment of an annual sum, part of the dividends of the stock, or a grant of an annuity secured on the dividends. If the parties had intended that it should be the latter, this mode of transaction would not have been adopted; but the deed would have contained a grant of the annuity, and an assignment of the dividends to a trustee to secure the annuity. The deed recites that Nicholson contracted for the purchase of a part of the dividends, and the deed is an assignment of the dividends. The grantee is subject to all the consequences to which the dividends are liable; and if the whole income of the fund had been assigned to different persons, and the dividends had been afterwards reduced, Nicholson could not have made the other assignees bear the whole loss, but must have borne his proportion of it.

In grants of annuities there is always a provision for payment of a proportionable part in case of the grantee dying between any of the days of payment. Here there is no such provision. *Brown v. Like.*(a)

Mr. *Sugden* and Mr. *Lynch*, contra :—It has been said that this is not an annuity, because the deed is not, in form, a grant. In annuity transactions there is no actual grant, except where the security is a freehold or a leasehold estate. When the annuity act speaks of a grant of an annuity, it means an annuity in whatever manner secured, whether by bond, covenant, or otherwise.

[\*158] \*There is nothing in this deed to show that, if the dividends are reduced, the grantee must bear his proportion of the loss. If the seller had intended that to be the case, he would have assigned to Nicholson a certain proportion of the dividends, instead of a specific sum of 150*l.*

As to there not being a stipulation for payment of a proportionable part of the annuity, there is here such a stipulation; only it is inserted at the commencement of the period for which the sum is to be paid, instead of at the end of it. This stamps the grant with the character of an annuity.

Then there is an assignment of a policy of insurance on the grantor's life.

1827.—Tanner v. Byne.

And in all cases of purchases of annuities, the purchasers take care to have their principal secured; as they consider it, not so much a purchase, as a loan at a certain sum per cent. The decision in *Brown v. Like* proceeded on the ground that the transaction was a sale out and out. That decision was directly against the opinion expressed by Lord Rosslyn, C. in *Duke of Bolton v. Williams*. (b) If this deed had been a sale of dividends, Nicholson would have been entitled to receive them in July, 1821: but it is expressly stipulated that he shall receive 12l. 10s., for interest, instead of those dividends. *Hood v. Burlton* (c) is precisely in point.

Mr. Shadwell, in reply:—No intention to make the grantor personally liable to pay the annuity, can be collected from this deed.

\*There is not only no grant, but no covenant to pay the annuity. The [\*159] stipulation as to the payment of 12l. 10s. shows that the parties contemplated that, but for that provision, the July dividends would have passed. The opinion alluded to in *Duke of Bolton v. Williams* is considered not to be law; and in *Hood v. Burlton*, Burlton covenanted to make up any deficiency in the funds.

The VICE-CHANCELLOR:—The single question here is, whether this deed is, substantially, a grant of an annuity of 150l. a year, for the life of Mr. Vause, secured by the dividends of a sum of 18,000l. three per cent. consols, or is only an assignment of such a proportion of those dividends as the sum of 150l. bears to the whole annual amount of those dividends.

The form of the expression used in the deed is immaterial. Now it is clearly not a sale of a proportion of those dividends; because the deed, being executed in the month of June, it is specially provided that the grantee shall not take such a proportion of the July dividends as the sum of 150l. bears to the whole amount, but the sum of 12l. 10s. only, being, in the language of the deed, the proportionable part of the annual sum of 150l. which would be due and payable at the time. This circumstance is decisive that it is not a sale of a proportion of the dividends, but a grant of an annual sum of 150l. for the life of Mr. Vause. The case of *Hood v. Burlton* is in point, both as to the form of the expression used, and the principle of the decision. And *Browne v. Like* is plainly distinguishable, being, in form and in substance, the sale of a proportion of the life interest.

\*TANNER v. BYNE.

[\*160]

1827, 16th and 17th March.—*Consideration*.—*Specialty creditor*.

A grant of an annuity to the grantor's sister, though expressed to be made for natural love and affection, may be proved to have been made in consideration of her marriage, and will entitle her to rank as a specialty creditor of the grantor.

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1827.—Tanner v. Byne.

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A husband made a post-nuptial settlement of 4,000*l.* in favor of his wife and children, and then in consideration of the 4,000*l.*, expressed to have been lent to him by the trustees of the settlement, made a mortgage to them of a real estate to secure that sum, and covenanted to repay it. The husband never, in fact, paid the 4,000*l.* to the trustees : Held, nevertheless, that they were specialty creditors of the husband.

THE plaintiff was a specialty creditor of Henry Byne, deceased ; and the object of the bill was to have the deceased's personal estate applied in payment of his debts. The usual decree having been made, the master reported to the following effect :—

That by an indenture, dated the 22d of September, 1807, made between the deceased, of the first part, Ann Isabella Augusta Byne, his sister, of the second part, and Humphry John Norris Bawden, and John Burgess Karslake, the younger, of the third part, the deceased, in consideration of his natural love and affection for his sister, and for making a permanent provision for her during her life, granted to her, for her life, an annuity of 50*l.*, charged upon certain lands in the county of Surrey, therein described, to commence from the 29th of September, 1807 ; and, for himself, his heirs, executors and administrators, covenanted with her to pay the annuity accordingly : that, before the date and execution of the annuity deed, a marriage had been agreed upon, and was afterwards solemnized, between Richard Bawden and Ann Isabella Augusta Byne ; that, upon the treaty for the same, the deceased agreed to

make a provision or settlement for his sister, and did, in consideration [\*161] \*of the marriage, and of his natural love and affection for her, grant to her the annuity of 50*l.* : that, as a further provision for her on her marriage, he did, by an indenture of settlement, bearing even date with the grant of the annuity, and made between him of the first part, his sister of the second part, Richard Bawden of the third part, and Humphry John Norris Bawden, and John Burgess Karslake, the younger, of the fourth part, assign (amongst other things) to Humphry John Norris Bawden, and John Burgess Karslake, the younger, the sum of 500*l.*, secured to him upon mortgage of certain lands in the county of Surrey, upon trust to pay the interest thereof to his sister, for her separate use, for her life, and, after her decease, to Richard Bawden, for life, and, after his decease, the trustees were to stand possessed of the 500*l.* upon trust for the issue of the marriage, as therein mentioned. The master also found that the defendant, who was the widow and administratrix of the deceased, by her affidavit stated that, by indentures of lease and release, dated the 29th and 29th of September, 1800, made between the deceased, of the first part, Ann Isabella Augusta Byne, of the second part, John Hubbersty, of the third part, and William Barry Wade, of the fourth part, for the consideration of natural love and affection the deceased granted, unto or for the use of Ann Isabella Augusta Byne, an annuity of 50*l.* for her life, and that that annuity was duly paid accordingly, as the deponent believed ; and that a marriage took place, in the month of September, 1807, between Ann Isabella Augusta Byne and Richard Bawden ; that, at the time of such mar-

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riage, and for a long time previously thereto, the indentures of the 28th and 29th of September, 1800, \*were in the possession of Hubbersty, and [\*162] the same could not then be obtained; whereupon the deceased granted the indenture of September, 1807, in lieu of the annuity granted in September, 1800, and that the annuities were one and the same, and that the indentures of the 28th and 29th of September, 1800, had since been delivered to the deceased, and were then in the deponent's possession; and that, at the time of the grant of the first-mentioned annuity, Ann Isabella Augusta Byne was not known, as the deponent believed, to Richard Bawden, and that it was not granted in consideration of any marriage then in contemplation, but was entirely voluntary on the part of the deceased: and that the deponent further stated that, in contemplation of the marriage between Ann Isabella Augusta Byne and Richard Bawden, the deceased transferred, unto or for their benefit, a mortgage for 500*l.*; and she, the deponent, and the deceased granted another annuity of 30*l.*, which had since ceased: that upon these grounds Richard Bawden and Ann Isabella Augusta, his wife, claimed to be due to them, under the indenture of the 22d of September, 1807, the arrears of the annuity of 50*l.* from the 29th of September, 1821, (up to which time the same was paid,) to the 25th of March, 1825. The master added that he had considered of this claim, and the evidence in support of it, and found that, under the covenant contained in the indenture of the 22d of September, 1807, Mr. and Mrs. Bawden were specialty creditors on the estate of the deceased, (the court having declared that the intestate had no title to the estate charged with the payment of that annuity;) and that the sum of claimed by them for arrears was due to them.

Mr. and Mrs. Bawden, by their affidavit (which the master referred [\*163] to in his report) deposed that, some years previous to their marriage, the intestate agreed or promised to settle an annuity of 50*l.* on or in trust for Mrs. Bawden; and that she believed that one or more deed or deeds, for that purpose, was or were prepared, but, whether such deed or deeds bore date on or about the 28th and 29th of September, 1800, or was or were ever executed by the intestate, she could not set forth: that she occasionally resided with the intestate previous to her marriage, and that she was, at times, furnished with small sums of money by him, but, according to her recollection and belief, she did not, on her own account, receive from him, between the 28th and 29th of September, 1800, and the day of her marriage, any sum or sums of money (after deducting the sum of 100*l.* which the intestate promised to bestow on her as a wedding present,) which, collectively, would amount to a sum equal to an annuity of 50*l.*, from the 29th of September, 1800, to the 22d of September, 1801; nor did she ever imagine or consider that such sums so received by her were paid in liquidation, or discharge; or in lieu of the annuity of 50*l.*, but (with the exception of the sum of 100*l.*) as the gratuitous presents of the intestate: that, upon the treaty for her marriage, the intestate agreed to settle 100*l.* per annum on her in manner following, (that is to say,) 50*l.*, part thereof, for her life, was to



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be charged on certain lands in the county of Surrey ; 30*l.*, other part thereof, during the joint lives of herself, the intestate, and his widow, was to be charged on certain lands in the county of Devon ; and 20*l.*, the residue thereof, for the life of Mrs. Bawden, was to be paid out of the interest of a sum of [\*164] 500*l.*, due to the intestate on \*mortgage : that deeds to effectuate such the intention of the parties were accordingly prepared and executed ; and that the annuity of 50*l.* so agreed to be, and actually settled on the marriage of the deponent, was not in lieu of the annuity of 50*l.* said to be settled, or agreed to be settled by the deeds of the 28th and 29th of September, 1800, but was in consideration of the deponent's marriage, and of the intestate's natural love and affection for her : that not only the interest of the 500*l.* due on mortgage, but also the principal sum of 500*l.* was also settled on the marriage ; and that, on the treaty for the marriage, Mr. Bawden agreed to convey and settle divers lands in the counties of Devon and Somerset, which were settled accordingly ; and that the property so settled by him was of the yearly value of 250*l.* and upwards.

The assets not being sufficient to pay all the intestate's debts, the plaintiff excepted to the report, on the ground that the covenant in the indenture of the 22d of September, 1807, was voluntary on the part of the intestate, and not supported against his creditors by any good or valuable consideration.

Mr. *Heald*, and Mr. *Teed*, in support of the exception :—The assets being deficient, it is important that the claim of Mr. and Mrs. Bawden should be brought under the consideration of the court, in order that it may be decided whether the debt they claim ought to be preferred to intestate's simple-contract creditors. The deed of September, 1807, is on the face of it, purely voluntary. At the time that deed was executed the marriage had been agreed upon ; and it contains no allusion whatever to the marriage. It appears by [\*165] \*the affidavit of Mr. and Mrs. Bawden that this deed was not made in lieu of the deeds of the 28th and 29th of September, 1800 ; the master reports that those deeds were not lost ; nor were there any arrears of the annuity secured by those deeds due at the time the indenture of September, 1807, was executed. This case therefore does not fall within the principle of *Gilham v. Locke*.(a) But, supposing that the deed of 1807 was made in lieu of the deeds of 1800, as the latter were voluntary, the former also must be voluntary.

Mr. *Knight*, in support of the exception :—The master does not state the contents of the defendant's affidavit, as facts, but merely as statements. The facts he finds are that, at and before the date and execution of the grant of the annuity, a marriage had been agreed upon between Mr. and Mrs. Bawden, and that it was afterwards solemnized. This grant therefore was made for a valuable consideration. The next deed is strictly a marriage settlement, and bears even date with the grant, and the husband is a party to it. Both deeds

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therefore are but one transaction; and they are both supported by the consideration of marriage. But supposing that the grant of 1807 were a substitution for that of 1800, still, on the authorities of the *Duke of Wharton's case*, (b) *Jones v. Boulter*, (c) and *Gilham v. Locke*, (d) it would be founded on, a valuable consideration.

Besides, although the grant purports to be made for natural love and affection, a valuable consideration \*dehors the deed may be proved. [\*166] *Chapman v. Emery*. (e)

It is not necessary that the grant should have been made in consideration of the marriage; for if in consequence of the grant a change in the circumstances of the grantee, such as marriage, takes place, it can not be afterwards questioned. (f) It can not be contended that Mr. Bawden did not know of the grant of the annuity: and he swears that on the treaty for the marriage he agreed to make a settlement of certain lands in Devon and Somerset, and that such settlement was afterwards made accordingly.

Mr. *Heald* in reply:—Mr. and Mrs. Bawden being interested parties cannot support the deed by their evidence. The fact that the husband is a party to one of the deeds and not to the other, so far from showing that the considerations of both were the same, proves that they were different.

The exception was overruled by the the Vice-Chancellor, who stated that the consideration of marriage, [1] being consistent with the alleged consideration of natural love and affection, might be averred, though not found in the deed, and well supported the master's finding. [2]

\*Another claim before the master arose out of the following circumstances. By indenture, dated the 19th of November, 1793, the intestate, Henry Byne, in consideration of the love and affection which he bore

(b) *Stiles v. The Attorney-General*, 2 Atk. 152. (c) 1 Cox, 268. (d) 9 Ves. 612.

(e) Cowp, 278; and see *Rex v. Inhabitants of Scammonden*, 3 T. R. 474.

(f) *Kirk v. Clark*, Proc. Cha. 275; S. C. 2 Eq. Ab. 165. *East India Company v. Clavell*, Gilb. Eq. Rep. 37; Proc. Cha. 377. *Brown v. Carter*, 5 Ves. 862. *Crofton v. Ormsby*, 2 Scho. & Lef. 583; and *George v. Milbanks*, 9 Ves. 190; see particularly 193.

[1] That marriage is a good and valuable consideration, see *Sterry v. Arden*, 1 Johns. Ch. Rep. 261. Affirmed, 12 Johns. Rep. 536. *Bradish v. Gibbs*, 2 Johns. Ch. Rep. 550. *Wheeler v. Wheeler*, 3 Cowen, 537. *Okichester's executors v. Voss' executors*, 1 Mun. 98. *Scott's executors v. Osborne's executors*, 2 Mun. 413. *Tunno v. Trezevant*, 2 Desau. 269. *Carnes v. Elliott's executor*, id. 299. If a grantee in a voluntary deed gains credit by the conveyance, and a person is induced to marry her, on account of the provisions made for her in the deed, such conveyance on the marriage ceases to be voluntary, and becomes good against a subsequent *bona fide* purchaser for a valuable consideration: and it makes no difference whether any particular marriage was in contemplation at the time of the voluntary settlement or not. *Sterry v. Arden*, ubi sup. S. C. by the name of *Verplanck v. Sterry*, 12 Johns. Rep. 536.

[2] When a consideration dehors the deed may be averred, see *Jackson v. Pike*, 9 Cowen, 69. *Jackson v. Delaney*, 4 Cowen, 427. *Meigley v. Hauer*, 7 Johns. Rep. 341. *Harvey v. Alexander*, 1 Rand. (Virginia,) Rep. 219. *Leahy v. Dancer*, 1 Moll. 313. A mere false statement of the consideration does not in itself necessarily vitiate a deed. *Bowen v. Kirwan*, Lloyd & Gould, 57.

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to Mary Anne Byne his first wife, who was a party to the deed, and in consideration of 10s. covenanted with Charles Pointz and William Barry Wade that he would, within three months from the date of that indenture, invest the sum of 4,000*l.* in the public funds, in trust to pay the dividends to the intestate, during his life, and, after his death, to his wife, Mary Anne Byne, for her life, and, after the death of the survivor, to divide the funds, in equal shares, between the children of the marriage.

By another indenture, bearing date the 14th of November, 1796, made between the intestate of the one part, and Pointz and Wade of the other part, reciting that Pointz and Wade had, that day, lent 4,000*l.* to the intestate, the intestate demised to them certain lands and hereditaments, in the parish Carshalton in Surrey, for 2,000 years, subject to redemption on re-payment of that sum with interest on the 14th of May then next; and the intestate covenanted to repay it accordingly. By a deed poll, bearing date the 29th of November, 1796, endorsed on the last-mentioned indenture, and made between the same parties, and reciting the settlement of the 19th of November, 1793, the trustees agreed and declared that they would stand possessed of the 4,000*l.* secured by the mortgage, upon the trusts of the settlement. Mary Anne Byne died before the year 1821, but there was issue of the marriage three children, who were then living. The intestate had, in his life-time, been deprived of the mortgaged estate, by a decree of the court of chancery. But [\*168] the master found that, under the several indentures before stated, there was due to Wade, the surviving trustee, as a specialty creditor upon the state of the intestate, the sum of 4,000*l.* and interest from the intestate's decease.

To this finding of the master also an exception was taken, by the plaintiff, on the ground that the deeds on which the claim was founded were voluntary, and not supported by any good or valuable consideration.

It was admitted by Mr. *Simpkinson*, who appeared in support of the master's finding, that, in point of fact, the 4,000*l.* had never been paid by the intestate to the trustees.

Mr. *Heald*, and Mr. *Teed*, in support of the exception, said that, as the 4,000*l.* had never been paid, the deed of 1793 was a mere post-nuptial settlement: and that, if it were held good against the creditors, a person who wished to defraud his creditors need only, in future, make a voluntary settlement, and, when the money secured by it became due, make another deed in consideration of the money due on the former.

Mr. *Simpkinson*, contra, was stopped by the court.

The VICE-CHANCELLOR:—If the 4,000*l.* had been, in fact, paid by the intestate to the trustees, it is not disputed that, although the settlement of the 19th of November, 1793, was subsequent to the marriage and merely voluntary, the master's finding would have been fully justified; and the trustees, having lent the money to the intestate, would have been duly constituted specialty [\*169] creditors by the indenture of the 14th of November, 1796. But it

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is contended that the money, not having been, in fact, paid by the intestate to the trustees, the second indenture is to be considered, like the first, as purely voluntary, and constituting no debt in competition with creditors. It appears to me that the transaction is, substantially, the same as if the 4,000*l.* had been actually paid by the intestate, and then returned to him by way of loan.

Exception overruled.[1]

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### FENNER V. TAYLOR.

1827, 20th and 21st, March, and 25th April.—*Feme covert.*—*Parent and child.*

The husband of a woman entitled to a fund in a cause signed, after the marriage, a written agreement that he would settle half the wife's fortune upon her; Held that the agreement enured to the benefit of the children of the marriage, and that, therefore, the wife could not waive it.

By the decree made in this suit, which had been instituted for the administration of an intestate's estate, to a share of which the plaintiff Fenner was entitled in right of the other plaintiff, his wife, who was one of the intestate's next of kin, it was referred to the master to inquire whether Fenner had made any and what settlement on his wife and the issue of their marriage, or had entered into any contract or agreement for that purpose. The master reported that, shortly after the marriage, Fenner had an interview with the defendant, Taylor, the husband of the administratrix, touching his wife's fortune, and that, at such interview, Fenner told Taylor that he intended to settle one half of his wife's fortune on herself, and that, on the 22d of December, 1810, Fenner wrote and signed, in Taylor's presence, a memorandum or agreement, as follows:—"London, 22d December, 1810. Memorandum: I do hereby agree that one half of the property to which Mrs. Fenner is entitled shall be secured upon herself." \*And the master also found that Fenner, on the 27th [\*170] of the same month, sent to the defendant Taylor a letter, in the words following:—"Mr. Fenner presents his compliments to Mr. Taylor, and informs him that he has consulted with his legal advisers on the subject of the proposed settlement, and that they are decidedly of opinion that Mr. Taylor's solicitor is the proper person to prepare the necessary writings, a draught of which it will be requisite to transmit for their perusal, describing fully the nature and extent of all properties to which Mrs. Fenner now is or will be, at any future period, entitled." And the master found that a draft of a deed of

[1] When a post-nuptial settlement or contract is valid, see *Reade v. Livingston*, 3 Johns. Ch. Rep. 488, 492; *Wickes v. Clarke*, 8 Paige, 161; *Sexton v. Wheaton*, 8 Wheat. 229; *Guardian of Elms v. Hughes*, 3 Desau. 158; *Taylor v. Heriot*, 4 Desau. 227; *Threewits v. Threewits*, 4 Desau. 560; *Bank of United States v. Ennis*, Wright's (Ohio) Rep. 604; *The same v. Lee*, 13 Peters, 118; *Bayard v. Hoffman*, 4 Johns. Ch. Rep. 452; *Seward v. Jackson*, 8 Cow. 406; *Wickes v. Clarke*, 3 Edw. V. C. Rep. 58.

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settlement was prepared by Taylor's solicitor, and sent to the solicitor of the plaintiffs for their approbation; but such draft had never been returned approved, nor had any settlement been executed. And the master found that Fenner had not made any settlement on his wife and the issue of their marriage, nor entered into any agreement for that purpose, except the agreement and letter before set forth.

Mr. and Mrs. Fenner had children living; but they were not parties to the suit.

The cause now coming on for further directions, it was stated that Mrs. Fenner was desirous of waiving her right to the settlement so agreed to be made by her husband; and the question was, whether she could be permitted to do so.

Mr. *Heald*, and Mr. *Roupell*, for the plaintiffs:—Although the court will not undo what has been completed, yet, where a matter remains in [\*171] agreement, and that made without consideration, the court will not \*enforce it. The wife is the only person who is intended to be benefited by this agreement. On what principle then can it be held that she is not entitled to waive it? If her right to a settlement had been derived under the order of this court, she might have waived it, although the order extends to the children. *Murray v. Lord Elibank*.(a) In a case, like the present one, which came before Sir W. Grant, M. R. but which is not reported, the wife was allowed to waive her right to a settlement.

Mr. *Hart* and Mr. *Treslove* for the defendants, cited *Thompson v. Attfield*,(b) *Ex part Gardner*,(c) *Colman v. Sarrel*,(d) and *Pulvertoft v. Pulvertoft*.(e)

The VICE-CHANCELLOR:—It is now fully settled that, after the order of this court for the husband to lay a proposal before the master, if the wife die while the matter rests in proposal, without waiving her right to a settlement, the settlement must be made for the benefit of the children: but if the wife thinks fit, after order made, while the matter rests in proposal, to waive the settlement, she may give the property to the husband, and thereby defeat the interests of the children. The question is whether there is a substantial difference between a proposal made under the usual order, and the agreement of the husband, which is found in this case. It is first observed in the argument for the plaintiff, that the agreement here is merely for the benefit of the wife, and not for the children, and, therefore, the children are here out of the question.

[\*172] To try this, let it be supposed that the wife did not \*waive this agreement, and that the court was called upon to carry it into execution, must not the court consider this agreement as a mere substitution for the equity of the wife, and consequently extend the benefit of the settlement to the children of the marriage? To try this further, let it be supposed that the wife had died, leaving children, without doing any act to waive this agreement, and that a bill had been filed, by the children against the father, to give effect to the

(a) 10 Ves. 84; and 13, 1. (b) 1 Vern. 40. (c) 2 Vez. 671. (d) 1 Ves. J. 60. (e) 18 Ves. 84.

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agreement, must not the court in that case also consider the agreement as a substitution for the wife's equity, and decree in favor of the children? If these conclusions be correct, then the consideration is, whether the mother can be permitted, by her consent in court, to deprive her children of the benefit of this agreement. The only case in point which touches this question is the case cited of *Ex parte Gardner*, before Lord Hardwick; where, under an order of the court directing a settlement, proposals were given and signed by the husband and the wife, which Lord Hardwicke considered as articles of agreement, to the benefit of which children were entitled; and although there were no children at the time of the application to the court, he would not permit the wife to waive the benefit of articles by reason of the possibility of future children. It is true that children were expressly mentioned in the proposals, but, for the reasons already stated, I consider the omission as to children in the present agreement, makes no difference. It is said that a case like the present came before Sir W. Grant, and that he permitted the wife to waive the agreement: but, the case not being in print, I am neither acquainted with the particular facts of the case, nor with the reasons upon which Sir W. Grant proceeded. Where the \*agreement of the husband is carried [\*173] into effect by the execution of a proper deed, it is not argued that the wife can then waive it: and, upon principle and by analogy, it should seem that, in equity, there is no distinction between the agreement and the deed. Upon the whole, therefore, I come to the conclusion, that this is an agreement which enures for the benefit of the children, and would be executed in this court upon a bill filed by them, and cannot, therefore, be waived by the wife.[1]

BENGOUGH v. EDRIDGE.

1826, 7th, 8th and 9th March; and 12th August; 7th November; 5th December.

1827, 16th January.—*Devise.*—*Perpetuity.*—*Construction.*

Trusts to be performed after the expiration of a term in gross of twenty years from the decease of the survivor of twenty-eight persons, who were living at the testator's decease, are valid.

The word "hereinafter" construed "herein."

HENRY BENGOUGH, Esq. by his will, dated the 9th of April, 1818, gave to his wife, Joanna Bengough, an annuity of 4,000*l.* for her life, to be paid by his trustees, out of the income of all his real and personal estates; and directed that, immediately after his decease, the sum of 1,000*l.* should be paid to her, by his executors, in discharge of a bond entered into by him previously to and

[1] Reversed 2 Russ. & M. 190, by Lord Brougham, who says that the decision of Sir William Grant, alluded to by the Vice-Chancellor, was in this identical cause. In a subsequent stage of the same cause, the like question came up again before Sir John Leach, then Master of the Rolls, who was constrained by the weight of authority, although "he still felt disposed to adhere" to his former opinion. And see 2 Story on Eq. 644. In the matter of *Ann Walker*, Lloyd & Goold, 324, 325.

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in consideration of their marriage. He likewise gave her all his household goods and furniture, household and other linen, plate, china, prints, wines, spirits and other liquors, and all his and her watches and wearing apparel, of every description, and his chariot and horses, and harness and stable furniture. And he also gave to her, for her life, his dwelling house in Saint James's Square, Bristol, and, after her decease, to the Rev. Charles Lucas Edridge,

Arthur Palmer the younger, the Rev. Charles Cadell Edridge and [\*174] George Wright, their heirs and \*assigns, upon trust, at any time within seven years after the decease of his wife, or as they should think proper and most advantageous, to sell the same: and he directed that the moneys to be produced by the sale should sink into, and become part of his general personal estate; and he also directed that, after the decease of his wife, and until the hereditaments directed to be sold should be sold, the rents and profits thereof should be paid and applied to and for the benefit of the persons who would, under his will and the trusts therein declared, be entitled to the income of the moneys to be produced by the sale of the same hereditaments, in case such sale had been then actually made, and in the same shares and proportions. Also he gave to the same four persons, their heirs and assigns, his messuage or mansion house, called Penn Park, with the gardens, coach-houses, stables and other appurtenances thereto, situate at Charlton, in the parish of Westbury-upon-Trym, in the county of Gloucester, and all his farms, messuages, lands and hereditaments, situate in the parish of Westbury-upon-Trym, and also in the parishes of Henbury and Filton, in the county of Gloucester, as well in his own occupation as in the tenure or occupation of any tenant or tenants; and also all his messuages, farms, lands, tenements, woods and hereditaments in the parishes of Horton, Yate, Berkeley, Hawkesbury and Iron Acton, or elsewhere in the county of Gloucester, and in the parishes of Pembridge and Kimbolton, or elsewhere in the county of Hereford, and all the messuages, farms, lands and hereditaments which he had agreed to purchase, and which should not have been conveyed to him at the time of his decease;

and all other the messuages, farms, lands, tenements and real estate, [\*175] whatsoever \*and wheresoever situate, belonging to him, either at law or in equity, or over which he had any power of appointment or other disposition, or in which he had any devisable estate or interest, (except his estate, right and interest in such real estate as he had thereafter devised to other persons,) to hold all the said several estates, lands and hereditaments so by him devised to the said four persons (except his said messuage and hereditaments in Saint James's Square aforesaid,) unto and to the use of them, their heirs and assigns for ever, upon trust; as to his messuage or mansion house, called Penn Park, and the gardens, coach-houses, stables, buildings, and appurtenances thereto, and such of his lands or grounds as he himself held and occupied with that messuage or mansion house, and which were all situate in the parish of Henbury, to permit and suffer his wife to reside in and occupy the same during her natural life; and upon trust, after her decease, out of the

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rents, income and profits of all his said trust estates thereby devised (except his messuage and hereditaments in Saint James's Square aforesaid,) to retain an annuity of 300*l.* during the natural life of his nephew, George Bengough, and to pay it to his said nephew, George Bengough, during his life; and, upon further trust, after the decease of his said wife, out of the rents, income and profits of his said trust estates, to retain an annuity of 200*l.* during the natural life of his nephew, Henry Bengough, and pay it to his nephew, Henry Bengough, during his life; and, subject to the payment of those respective annuities, and otherwise subject as thereinbefore mentioned, upon trust, that the trustees should, from time to time during the term of twenty-one years to be computed from the day of his decease, receive the rents, issues

\*and profits of all his real estates devised to them in trust as aforesaid, and, subject to the payment of the annuities of 4,000*l.*, 300*l.*

and 200*l.*, from time to time during the continuance of the term of twenty-one years, lay out and invest the moneys to arise from such rents, issues and profits in the purchase of freehold estates of inheritance, in fee-simple, in England, as often as there should be a surplus in hand arising from the receipt of such rents, issues and profits, amounting to the sum of 1,500*l.*, after paying the annuity of 4,000*l.*, either out of the rents of his real estates, or out of the income of his personal estate, or out of both those funds, and also after paying the annuities of 300*l.* and 200*l.* out of the rents of his real estates; and he directed that such freehold estates of inheritance so to be purchased should, from time to time, be conveyed and assured unto and to the use of the trustees for the time being of his will, upon the same trusts, and for the same ends, intents and purposes, and subject to the same powers, provisoes and conditions as were thereafter limited and expressed concerning the messuages, lands, tenements, estates and hereditaments by him thereinbefore devised unto and to the use of the said trustees, their heirs and assigns: and he directed that his trustees should never permit a larger sum than 500*l.*, arising from the rents and profits of his real estates, to remain at any one time in the hands of any banker; but that, when there should be 500*l.* in hand, it should be laid out in the purchase of three per cent. consolidated bank annuities, in the names of the trustees for the time being, until a convenient purchase could be found: and he directed that the interest, dividends and income of such bank annuities should, during the term \*of twenty-one years, and no longer, accumulate, in [\*177] the same manner, and for the same purposes as the rents and profits of his real estates, so to be purchased as before mentioned, were by him directed to accumulate.

And as to all the trust estates and hereditaments by him devised as aforesaid (except his messuage and hereditaments in St. James's-square) upon trust that the trustees should retain and stand possessed of them during the term of one hundred and twenty years, to commence from his death, if his nephews George Bengough and Henry Bengough, his nephew James Bengough, his great nephews Henry Ricketts, the younger, and Richard Ricketts, the



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younger, his niece Ann Elizabeth Bengough, his great niece Ann Ricketts, the younger, thereafter named, the ten children then living of Charles Lucas Edridge (for whose names a blank was left in the will,) and the eleven children then living of Arthur Palmer, (whose names were mentioned,) or any or either of his said nephews and nece, and great nephews and great niece, or any or either of the said several children of the said Charles Lucas Edridge and Arthur Palmer, should so long live, and also during the term of twenty years, to be computed from the expiration or other sooner determination of the term of one hundred and twenty years, nevertheless in trust for the person and persons thereafter mentioned, and for the respective times thereafter expressed, (that is to say,) upon trust for his nephew George Bengough for a term of ninety-nine years, if he should so long live, and the terms of one hundred and twenty years and twenty years, or either of them, should so long continue; and, after the determination of the terms of ninety-nine [\*178] years, in trust for the \*first, second, third, fourth, fifth, sixth, and all and every other and subsequent born sons of the same George Bengough, successively, according to the priority of their births; and, after the determination of the estate and interest of each of the same sons respectively, and also, as the circumstances of the case should require, after the determination of the estate of any person taking from time to time under, or as answering the description of heir male of his body, in trust for the person who, for the time being, and from time to time, should answer the description of heir male of his body, or who, in case of the death of his parent, if such death had taken place, would be heir male of his body under an estate tail limited to the same son and the heirs male of his body, to hold to the same son or person respectively for a term of ninety-nine years, if the same son or person should so long live, and the said terms of one hundred and twenty and twenty years, or either of them, should so long continue, every elder of the same sons, and the person who for the time being and from time to time should answer, or, in case of the death of his parent, if such death had taken place, would answer the description of heir male of his body, to be preferred before every younger of the same sons and the person who, for the time being, should answer, or, in case of the death of his parent, if such death had taken place, would answer the description of heir male of his body; and, after the determination of the respective estates and interests of the first and every other subsequent born sons of the same George Bengough, and of the person who, for the time being, should be, or who, in case of the death of his parent, would be heir male of the body of the same sons respectively, then in [\*179] trust for his said nephew Henry Bengough, for a term \*of ninety-nine years, if he should so long live, and the said terms of 120 years and twenty years, or either of them, should so long continue: and, after the determination of the last-mentioned term of ninety-nine years, in trust for the first, second, third, fourth, fifth, sixth, and all and every other subsequent born son of Henry Bengough, successively, according to the priority of their births;

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and, after the determination of the estate and interest of each of the same sons of Henry Bengough respectively ; and also, as the circumstances of the case should require, after the determination of the estate of any person taking from time to time under or as answering the description of heir male of his body, in trust for the person who, for the time being, and from time to time, should answer the description of heir male of his body, or who, in case of the death of his parent, if such death had taken place, would be the heir male of his body under an estate tail limited to the same son and the heirs male of his body, to hold to the same son of Henry Bengough or person respectively, for a term of ninety-nine years if the same son or person respectively should so long live, and the terms of one hundred and twenty years and twenty years, or either of them, should so long continue, every elder of the same sons, and the person who, for the time being, and from time to time, should answer, or, in case of the death of his parent, if such death had taken place, would answer the description of heir male of his body, to be preferred before every younger of the same sons and the person who for the time being should answer, or, in case of the death of his parent, if such death had taken place, would answer the description of heir male of his body : (the testator then made successive limitations, during the terms of one hundred and twenty years and twenty \*years, to his nephew James Bengough, his great nephews [\*180] Henry Ricketts, the younger, and Richard Ricketts, the younger, his niece Ann Elizabeth Bengough, and his great niece Ann Ricketts, the younger, respectively, and to their respective first and other subsequent born sons, and to the persons who, for the time being should be, or who, in case of the death of their respective parents, would be heirs male of such sons respectively, similar to the limitations before stated to have been made to George and Henry Bengough, and to their first and other subsequent born sons, and to the person who for the time being should be, or who, in case of the death of his parent, would be heir male of the body of the same sons respectively, except that he directed that the estates of Henry Ricketts the younger, and Richard Ricketts the younger, and of their respective sons, and of the persons or person answering the description of heirs male or heir male of their respective bodies should cease, if he or they, for the time being, should refuse to take the surname and bear the arms of Bengough only, after he or they should respectively become entitled to the receipt of the income of the trust estates, and that the estates of Ann Elizabeth Bengough, and Ann Ricketts the younger, and of their respective husbands, and of the first and other sons, and of the persons answering the description of heirs male of their respective bodies, should respectively cease, if he or they, for the time being, should refuse to take the surname and bear the arms of Bengough only, after he or they respectively should become entitled to the receipt of the income of the trust estates :) and, after the determination of the respective estates and interests of the first and other subsequent born sons of the said Ann Ricketts, the younger, and of

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[\*181] \*the person who for the time being, should be, or who, in case of the death of his parent, would be heir male of the body of the same s ns respectively, then in trust for the person or persons respectively who, for the time being, and, from time to time, should answer the description of the testator's heir, or right heirs-at-law, and, if there should be more than one, in the same shares as they would be entitled to a real estate descending from him as the first purchaser thereof, and vesting in him or them as his right heirs, to hold to the same person or persons respectively, and, if more than one, as tenants in common, as to each of the same persons, respectively, for a term of ninety-nine years, if the same person should so long live, and the said terms of one hundred and twenty years and twenty years, or either of them, should so long continue: and he directed that each of the terms of ninety-nine years should commence and be computed from the time when the person or persons respectively to whom the same terms were limited, should become entitled to the income of any part of his trust estates under the limitations or trusts therein contained; and that, in case the limitations or trusts thereinbefore contained to or in favor of persons unborn, could not take effect precisely in the order in which they were directed to take place, and there should, consequently, be any suspension of the beneficial ownership by reason that the persons entitled to take under the same limitations or trusts should not be then born, then the income of his said devised trust estates should, during such suspension of ownership, belong to the person or person for the time being entitled, or who, in case there had not been such suspension of ownership, would, for the time being, and from time to time, have been entitled

[\*182] to the next \*estate in remainder, subject nevertheless to the right of any person or persons to be afterwards born, and who would have been entitled under any prior limitation or trust, to have, receive and take the income of his trust estates, from his, her, or their actual birth or respective births.

And he directed that, after the determination of the terms of one hundred and twenty years and twenty years, his trust estates should be settled, conveyed and assured, by his then trustee or trustees thereof, to and upon such person and persons, as would, at that time, be entitled to the same, either by purchase or descent, for the first or immediate estate or estates for life, in tail, or in fee therein, if the same trust estates had been, by his will, devised, settled or assured, to the use of his nephew George Bengough, and his assigns, for his life, with remainder to his first and other sons, successively, according to the priority of their births, in tail male, with remainder to his nephew Henry Bengough, and his assigns, for his life, with remainder to his first and other sons successively, according to the priority of their births, in tail male, with similar remainders in succession to his nephew James Bengough, his great nephew Henry Ricketts the younger, his great nephew Richard Ricketts, the younger, his niece Ann Elizabeth Bengough, his great niece, Ann Ricketts, the younger, and their sons, respectively, with a proviso for the cesser of the estate of Hen-

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ry Ricketts the younger, and Richard Ricketts the younger, and their respective first and other sons, and the heirs male of their respective bodies, who for the time should refuse to take the surname and bear the arms of Bengough only, after he or they should respectively become entitled to the receipt \*of the said income, and also for the cesser of the estate of Ann [\*183] Elizabeth Bengough and Ann Ricketts, the younger, and their respective husbands, and the first and other sons of their respective bodies, who, for the time being should refuse to take the surname and bear the arms of Bengough only, after he or they respectively should become entitled to their receipt of the said income, with reversion to his own right heirs: and he further directed that the person or persons to whom such conveyances should be made should have such estate in the trust estates as he or they would, at that time, be entitled to take under the said limitations, if the same limitations were actually made by his will, and with the same or like remainders over as if the trust estates had been devised by his will, in manner aforesaid, or as near thereto as might be, and the circumstances of the case and the rules of law and equity would permit, yet nevertheless that no such person should have or be entitled to a vested estate, or any other than a contingent interest, until the expiration or sooner determination of the terms of one hundred and twenty years and twenty years: and he declared that such limitations were introduced into his will only for the purpose of ascertaining the objects to whom such conveyances should be made, and not for the purpose of making any immediate devise or gift to, or raising any immediate or present estate, by way of trust or otherwise, for them; on the contrary thereof, he directed that, during the terms of one hundred and twenty years and twenty years no person or persons should be entitled, at law or in equity, to any beneficial estate in his trust estates, or the income thereof, by way of vested interest, for any longer period than ninety-nine years determinable as before mentioned; and that, in the events and in the mode thereinbefore expressed, heirs \*or heirs of the body should be entitled [\*184] to take, in the first instance, and as purchasers in their own right. And he directed that if, at any time during the terms of one hundred and twenty years and twenty years, each or either of the male persons who, for the time being, should be entitled to the income of his trust estates, should require the same, it should be lawful for his trustees to convey and assure to such person the trust estates, or such one of the same, or part or share thereof, as he should be entitled to under the trusts or limitations thereinbefore contained, for an estate of freehold, for the life of the same person, so as to give him or her an estate of freehold, instead of an estate for ninety-nine years: and he empowered his trustees, during the terms of one hundred and twenty years and twenty years, with the consent of the persons who, for the time being, should be entitled to the rents of his trust estates, under the limitations therein contained in trust for them respectively, to lease his trust estates for fourteen years: and he empowered his nephews and great nephews, and their descendants, when they should be entitled to the income of his trust estates, to jointure their wives

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out of the trust estates, to the extent of 400*l.* a year; and he authorized his trustees, with the consent of the persons who, for the time being, should be entitled to the rents of his said trust estates under the limitations of his will, to sell or exchange the trust estates; and he also empowered them to repair his trust estates, and to cut timber therefrom, and to employ stewards bailiffs and managers for the same: and he directed that, if any contract for the purchase of any hereditaments which he had entered into, should not be completed at his death, they should be completed by his trustees, and that the purchase moneys should be paid out of his personal estate, and that the conveyances should be made to them, their heirs and assigns upon the same trusts as were declared concerning the real estates before devised to them.

And he gave all his printed books and manuscripts of every description to his trustees, in trust to permit them to remain in the possession of his wife, during her life; and, at her decease, he directed that they should from time to time be considered heir looms, to be kept at Penn Park House, and be held and enjoyed by the person or persons for the time being entitled, under the devises or limitations therein contained, to his paternal estates in the parishes of Pembridge and Kimbolton.

And the testator, after giving several legacies, many of which he directed should not be payable until after the death of his widow, and also some annuities, gave to his trustees, their executors and administrators, all the rest, residue and remainder of his stocks, funds, moneys, mortgages and securities for money, and all other his goods, chattels and personal estate and effects whatsoever and wheresoever, subject to the payment of his just debts and funeral and testamentary expenses and the several legacies and bequests by him, in and by his will given and bequeathed as aforesaid, upon trust that they should either continue his moneys upon the securities upon which the same should be invested at his decease, or call in the same, and sell all such parts of his residuary estate and effects as should not consist of money or securities

for money: and he directed that, during the term of twenty-one years, to be computed from the day of his decease, the trustees for the time being of his will should receive the dividends, interest and annual income of all his residuary estate and effects, and, from time to time during such term of twenty-one years, place, lay out and invest all such dividends, interest and income, and the accumulations of the same, in the names of the trustees for the time being of his will, either in the three per cent consolidated bank annuities, or upon mortgages of freehold hereditaments in Great Britain, of a clear and indefeasible estate of inheritance in fee-simple, as they should think proper, as an accumulating fund, in order to increase the principal of his residuary estate and effects during such term of twenty-one years, and should with all convenient speed, from time to time during that term, lay out and invest all his residuary estate and effects, and all accumulations thereof, in purchases of freehold hereditaments of an estate of inheritance in fee-simple,

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in England or Wales, when eligible purchases should arise, which estates so to be purchased should be conveyed, unto and to the use of the trustees, in fee, upon the same trusts, estates, uses, intents and purposes, and under and subject to such and the same and the like powers, provisos, charges, conditions, restrictions and limitations, as were by him thereinbefore declared concerning his said estates by him thereinbefore devised to them in trust as thereinbefore mentioned, or as near thereto as the deaths of parties, the change of interests, and other circumstances and contingencies, would admit; and appointed his trustees to be executors of his will.

The testator died on the 10th of April, 1818, leaving George Bengough his heir-at-law, and Henry Bengough, \*James Bengough, Henry [\*187] Ricketts the younger, Richard Ricketts the younger, Ann Elizabeth Bengough, and Ann Ricketts the younger, and also his widow, and his trustees and executors surviving him.

The plaintiff and his brothers and sister, and Ann Ricketts, widow, the testator's sister, were his only next of kin at the time of his death. Shortly after the death of the testator, Charles Lucas Edridge, Arthur Palmer, and Charles Cadell Edridge, proved the will; but George Wright renounced the probate of it, and executed a deed of disclaimer, as to the real estates, to the other trustees.

On the 10th of June, 1821, Mrs. Bengough died. The bill was filed by the testator's nephew, George Bengough, (who had no son born,) against the acting trustees and executors, and also against Henry and James Bengough, Henry and Richard Ricketts; Ann Elizabeth Bengough, and Ann Ricketts, none of whom had a son, and certain persons named Cadell and Lunell, who were the personal representatives of Ann Ricketts, the testator's sister, who died in 1819; and, after setting forth the will and other circumstances before mentioned, it stated that, under the will, the plaintiff was entitled (if all the trusts thereof were valid) to the real estates devised by the testator upon the trusts aforesaid, for a term of ninety-nine years, (if the plaintiff should so long live,) to commence from the death of the testator, but subject to the trust for the trustees to receive the rents and profits thereof, for the term of twenty-one years, to be laid out as in the will was mentioned; and that the plaintiff was also entitled, for the residue of a like term, to the freehold estates of inheritance \*to be purchased with the testator's residuary personal property, and [\*188] with the accumulations thereof, subject to the trusts for the trustees to receive the rents and profits of the freehold estates of inheritance so purchased, for twenty-one years, to be laid out in the purchase of other freehold estates of inheritance, to be settled to the same uses as the estates devised by the will; and that the trustees ought, during the term of twenty-one years from the death of the testator, to lay out the rents and profits of the estates so devised to them in trust as aforesaid, in the purchase of freehold estates of inheritance in England or Wales, as often as they should have received the sum of 1,500*l.* from such rents and profits, after payment of the annuities to the plaintiff and

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Henry Bengough, which were charged upon the devised estates, in case those annuities should become payable during the term of twenty-one years, and that the plaintiff was entitled, under the will, for a term of ninety-nine years, if he should so long live, to be computed from the death of the testator, to the immediate possession and enjoyment of the freehold estates so to be purchased with the moneys arising from the rents and profits of the devised estates, and, in case the rents and profits of the devised estates should not be laid out when they should amount to 1,500*l.*, that the plaintiff was entitled to the interest and dividends of such sum of 1,500*l.* from the time the said rents and profits amounted to such sum until the same should be laid out in the purchase of freehold estates as aforesaid: but, if the limitations subsequent to the life estates to the plaintiff and his first son were void, the plaintiff was entitled,

subject to those estates and the trust for accumulation, as a resulting trust [\*189] to the \*testator's heir-at-law, to his real estates, and to the estates to

be purchased with his residuary personal estate, or to a share thereof, as one of the next of kin. And the bill charged that there was no direction in the will for the accumulation of the rents and profits of the freehold estates to be purchased, or that the trustees should receive such rents and profits, but that the testator intended to give to the plaintiff the immediate enjoyment of the freehold estates so to be purchased, with the rents and profits of the devised estates; and that, under the will, the plaintiff was entitled to have the whole of the rents and profits of the devised estates which accrued during the life time of Mrs. Bengough, subject to the payment of the annuity of 4,000*l.*, and, after her death, the residue of such rents and profits, after payment of the annuities of 300*l.* and 200*l.* to the plaintiff and Henry Bengough, applied, as ~~then~~ as the same should amount to 1,500*l.*, during the term of twenty-one years from the death of the testator, in the purchase of freehold estates of inheritance, and to be let into the possession and the enjoyment of such estates as soon as the same were purchased, for a term of ninety-nine years, if he should so long live, to be computed from the testator's death, and that, in case those rents and profits should not, immediately as they amounted to 1,500*l.* be laid out in such purchases, that the plaintiff was entitled to receive the interest and dividends arising from such sum of 1,500*l.*, until the same should be so laid out. The bill prayed that the will might be declared to be well proved, and that the trusts

thereof, so far as the same were good in law, might be decreed to be [\*190] carried into execution; and that an account might be taken of the \*personal

estate and effects of the testator, and of his funeral and testamentary expenses, and debts, and legacies and annuities; and that the clear residue of the personal estate might be applied upon the trusts of the will, so far as the same were effectual in law; and, as far as the same were ineffectual in law, then to such person or persons as would, in such case, by law be entitled thereto: and that an account might be taken of the testator's real estates, and of the rents received by the trustees; and that what should be found due from them on taking that account might be applied upon the trusts of the will, as far as

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the same were good in law; and that the court would be pleased to declare how far the trusts of the real and personal estate were good; and, as far as the trusts were declared to be void, that the plaintiff might be declared to be entitled to the real estate: but, in case the trusts of the will should be considered valid, then that such of the rents and profits of the estates devised to the trustees in possession as accrued during the life of Mrs. Bengough, might be applied in the purchase of freehold estates of inheritance in England or Wales, and that the annuities of the plaintiff and Henry Bengough might be paid out of the rents and profits that had accrued and should accrue after her death; and that the residue thereof might, during the remainder of the term of twenty-one years, be also applied in the purchase of freehold estates of inheritance in England or Wales, and that such estates, when purchased, might be conveyed to the trustees upon the trusts declared of the estates so to be purchased; and that, as often as there should be the sum of 1,500*l.* arising from the rents and profits of the devised estates, it might be laid out in such purchases of freehold estates \*as aforesaid, and that the plaintiff might be declared [\*191] to be entitled to the immediate possession and enjoyment of the said estates so to be purchased, for the term of ninety-nine years, if the plaintiff should so long live, such term to commence or be computed from the death of the testator, and that, in case the said rents and profits should not, as soon as they amounted to 1,500*l.*, be so laid out, the plaintiff might be declared entitled to the interest and dividends thereof from the time the same amounted to 1,500*l.* until the same should be laid out in the purchase of freehold estates; or that, in case the same trusts were partly valid and partly invalid, then that proper directions might be given for effectuating such of the trusts as were valid, and for declaring and effectuating the rights of the persons entitled, so far as the trusts were invalid.

One question in this cause was, whether the trusts of the will were not void for remoteness. The other question was, whether the word, "thereinafter" in the accumulation clause, was not to be construed "therein."

Mr. Piggott, for the plaintiff, opened the pleadings; and, it having been arranged that the counsel for the trustees should first address the court;

Mr. Preston, for two of the trustees, spoke in substance as follows:—On the introduction of the various modifications of estates made through the medium of uses and trusts and by executory devise in wills, it was held that the vesting of an estate could not be suspended for a longer period than the life of the survivor of existing individuals.

\*In the case of *Lloyd v. Carew*,<sup>(a)</sup> an objection was taken that the [\*192] shifting use was suspended, not only for the period of lives in being, but for one year certain, after the determination of those lives; but the limitation was, by the house of lords, decided to be valid. And if a gift may be suspended for one year, it may be suspended for two or three years, and so

(a) Shower's P. C. 137.



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on, progressively, through the whole series of twenty-one years. For where the law is settled that, a period of one year certain may be taken, it is impossible to graft into that doctrine the exception, on which the argument on the other side must depend, namely, that the term of twenty-one years is to be taken with reference to the period of minority.

The contest in this case is whether the vesting can be suspended for lives in being and twenty-one years, not with reference to minority, but of positive time. In *Taylor v. Biddall*,<sup>(b)</sup> (a case in which the prior cases were cited,) it was admitted that it might be suspended for twenty-one years after lives in being. In *Stephens v. Stephens*,<sup>(c)</sup> there is the opinion of the judges, and amongst them was Lord Hardwicke, to the same effect: they certainly delivered their judgment very cautiously upon the case. The question there was, whether the enjoyment might be suspended for twenty-one years beyond a life in being. In *Long v. Blackull*,<sup>(d)</sup> the principal question was, whether two periods of gestation should be allowed. It was agreed that there might be one period of gestation. In that case two periods were allowed, one [\*193] at the commencement, \*the other at the end of the contingency. On that case it has been sometimes observed that it was very slovenly argued, and not very solemnly decided. But, from the opinion delivered by Mr. Justice Buller in *Thellusson v. Woodford*,<sup>(e)</sup> it appears that the law is free from that reproach: Lord Kenyon presided; and in *Woodford v. Thellusson*, Mr. Justice Buller gave that case the sanction and support of his concurrence.

Then there are the cases of *Goodman v. Goodright*,<sup>(f)</sup> and *Goodtitle v. Wood*; <sup>(g)</sup> in the former of which Willes, C. J. observed: "The rule has, in many instances, been extended to twenty-one years after the death of the person in being, as, in that case likewise there is no danger of perpetuity." In *Heath v. Heath*<sup>(h)</sup> the devise was to the testator's son E. H. for ever, if he should have a son or sons who should attain twenty-one; but, if E. H. should chance to die without son or sons to inherit, that the son of the testator's son W. H. should inherit. So that there was not any gift, to E. H. or to the second son, with reference to his own minority; but E. H. himself was to have the absolute fee, only on the terms that he should have a son who should attain twenty-one. It appears from the wills and settlements prepared and settled by Mr. Booth, Mr. Fearne, and other eminent conveyancers, that they never doubted that the twenty-one years after lives in being might be taken as an absolute term, independently of minority, and such a limitation, is in every day's practice, inserted in creating powers of sale to be exercised in defeazance of estates in fee, and sometimes of limitations in strict settlement.

[\*194] \*In the argument of the case of *Thellusson v. Woodford*,<sup>(i)</sup> in the court of chancery, the objection was in substance the same as is now

(b) 2 Mod. 289.

(c) 4 Ves. 227; see page 323.

(h) 1 Bro. C. C. 147.

(e) Ca. Temp. Talb. 232.

(f) 2 Burr. 873.

(i) 4 Ves. 227.

(d) 7 T. R. 100.

(g) Willes, 211.

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made in this case, namely that the party had been guilty of a breach of the rule against perpetuities; because he had taken a certain number of lives in being as the measure of time, not for the purpose of giving, but of suspending the enjoyment of the property. The judges, in that case, certified their opinions that the law permitted such a mode of limitation; and that opinion was confirmed by the house of lords. But an expression is reported to have fallen from Lord Alvanley in that case, which probably will be relied on by my opponents; I mean that passage in the report where his lordship says<sup>(k)</sup> that the term of twenty-one years has never been considered as a period which may, at all events, be added to an executory devise after lives in being; but that the term had been adopted with a view to the period of minority. But surely there must be something more strong than such a mere dictum to induce the court to decide that the term of twenty-one years cannot be allowed after lives in being, except where it is used with reference to the period, and for purposes connected with minority. Such a dictum cannot guide the opinion of the court, where other dicta and other decisions contradict it; and where all the great text-writers, Fearn, Blackstone, and Wooddeson lay down the rule without any reference to the period of minority as necessary to give effect to the limitation over.<sup>(l)</sup> Besides all these authorities, the act of parliament of 39 and 40 Geo. 3, c. 98, is a legislative declaration to the same effect. But the case of *Beard v. Westcott*<sup>(m)</sup> may perhaps be relied [\*195] on by the other side.—In that case the judges of the court of common pleas, to whom the case was first sent, returned a certificate in favor of the validity of the gift. But some doubt arose in the mind of the then master of the rolls, by reason of the expression in Lord Alvanley's opinion, already stated, that the term of twenty-one years must be with reference to minority; the question was therefore distinctly brought before the court upon that point. On the second argument the judges certified that they were of opinion that the gift would be good, although the term of twenty-one years had reference, not to the minority of the donee, but of another person. It is surprising that any doubt was ever entertained on that point, as the decision of Lord Thurlow in *Heath v. Heath*<sup>(n)</sup> is an express authority, and settled the doctrine. But it is worth while to notice who were the judges in the court of common pleas who certified in the case of *Beard v. Westcott*. They were Sir James Mansfield, (who was counsel in the first argument of *Thellusson v. Woodford*, and was afterwards on the bench, and delivered, not merely his opinion but his reasons in detail in that case) and Mr. Justice Heath, Mr. Justice Lawrence, and Mr. Justice Chambre, who sat as judges in the house of lords when *Thellusson v. Woodford* was decided there. The master of the rolls, on being pressed with the importance of the question, was persuaded to send the case of *Beard v. Westcott* to the king's bench: and the judges of that court certified that the

(k) 4 Ves. 337.

(l) See Fearn's Cont. Rem. 429, 438; 2 Black. Com. 174; 2 Wood. 229.

(m) 5 Taunt. 393; 5 B. & A. 801; 1 Turn. 25.

(n) 1 Bro. C. C. 147.

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gift was void. To understand the grounds of their certificate in that [\*196] case it is necessary \*to consider the principle of the law applicable to perpetuities. The rule is that, if one limitation is too remote, every subsequent limitation must also be too remote, and for that reason void. In *Beard v. Westcott* the party attempted to introduce in the alternative (if the expression may be used) another gift after one which was too remote; and the language of the judges is adapted to that state of the case, and applies, in some degree, to the case of *Lord Deerhurst v. the Duke of St. Albans*,<sup>(o)</sup> which was decided in this court, as to the limitation of heir-looms, and to *Humberston v. Humberston*.<sup>(p)</sup> The decision of the court of king's bench in *Beard v. Westcott* is reconcilable with the rules of law, because it proceeded upon the ground, that a gift made by way of substitution for one which is too remote, is as bad as that for which it is attempted to be substituted. That is the whole result of the certificate, and of the decision in *Beard v. Westcott*. It is of great importance to refer to the observations of Lord Chief Baron Macdonald and of Lord Eldon, in the case of *Thellusson v. Woodford*, on the appeal,<sup>(q)</sup> as to the number of lives. Nothing can be more clear than that there is no restriction as to the number of lives in being during which the accumulation may take place, or the vesting of the inheritance or of the freehold be suspended. That being settled, and the statute 39 and 40 Geo. 3. c. 98, having enacted that the accumulation may also be for a period of twenty-one years certain from the death of the testator, it is impossible for any court, acting on the law as it now stands, to hold that a gift is too remote which does not exceed these prescribed limits of lives and twenty-one years.

[\*197] \*It is to be observed that, by this will, the legal estate as to the realty, (and for this purpose the argument is the same as to the personality,) is vested in trustees in fee-simple, and consequently the whole trust is under the dominion of the court, and must be executed by it. The first gift is upon trust to accumulate for twenty-one years; and that gift is supportable under the statute 39 & 40 Geo. 3. c. 98. It is impossible to resist the validity of that trust: for, if the law was not so before the statute, by force and reason of the statute it is so now; otherwise the statute is, as to the right to accumulate for twenty-one years from the death of the testator, a dead letter. In the clause of the will which relates to the accumulation for this period, there is a direction to lay out the rents and profits in the purchase of estates; and it unfortunately happens that there is, by a clerical error, the insertion of the word, "hereinafter," instead of "hereinbefore." This clerical mistake raises another question in this case.

The next period is that which gives the enjoyment to those who are to be owners in the interval, till the conveyance is to be made to the parties entitled to call for a conveyance on the determination of the terms of one hundred and twenty years and twenty years, that is, when estates of freehold may first vest.

(o) 5 Madd. 232.

(p) 1 P. W. 332.

(q) 11 Ves. 112.

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The singularity of the limitations is, that the testator takes a term of one hundred and twenty years, determinable on the death of lives in being, and twenty years beyond that period, for the purposes of regulating the enjoyment during those terms, and suspending the right to vested estates of freehold or inheritance. The twenty years cannot be objectionable. That is decided in many cases; and, before the \*statute of Geo. 3, he might have direct- [\*198] ed an accumulation for the whole term of one hundred and twenty years, if any one of any number of persons in existence should so long live. This limitation is, in effect, only for a certain number of lives in being, and twenty years after. During the period of the suspension of the inheritance the right of enjoyment is not suspended: for every person who is successively brought within the scheme of the gifts is to take for ninety-nine years, if he shall so long live, and if the terms of one hundred and twenty years and twenty years shall so long continue. That is the extreme boundary. The limitation for ninety-nine years if a life or lives shall so long last, is clearly within the rule against perpetuities; and the terms of one hundred and twenty years and twenty years are noticed only to show that the right of enjoyment under these terms is independent of, and not affected by the suspension of the inheritance. In the case of *Mogg v. Mogg(r)* the court was of opinion no perpetuity existed as to leaseholds for years determinable on lives, even though there might be a renewal, and probably would be renewals under the tenant right. The ground of that opinion was, that there could not be any perpetuity, because the estate was determinable with lives in being. In *King v. Cotton,(s)* the court decided that a gift over on a general failure of issue was not void, inasmuch as the estate of the testator was confined to a term of years determinable on the deaths of lives in being. In Mr. Fearn's Treatise,(t) many instances of this sort are given, and he himself puts the instance of an executory devise for \*life to one *in esse*, to take effect on a dying without issue; [\*199] he treats it as good, because it must take place or fail during the life in being. In *Oakes v. Chalfont(u)* that point was recognized as good law. So in the present case, as each succeeding person is to take only for ninety-nine years if he shall so long live, there cannot be any perpetuity. It is impossible to object to the limitation to the first taker, unless it be contended that the whole trust is void. But there is at all events a clear trust, which, even if void in its full extent, is of such a character that the court must execute it so far as it is consistent with the rules of law. The doctrine of *cy pres* must be applied to it. The case of *Tregonwell v. Sydenham(x)* is a conclusive authority on that point. In that case the testator created a term of sixty years, and directed an accumulation for the benefit of persons to be ascertainable at a future period, so that the trust was void to a certain extent. The court sustained the term which was limited, *in toto*, and took so much of the trust as was valid, and executed it, as in *Pemberton's case*; and as to that part of the trust which

(r) 1 Mer. 654. (s) 2 P. W. 674. (t) Cont. Rem. 488. (u) Pollexf 38. (x) 3 Dow. 194.

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was void on the ground of remoteness, and as tending to a perpetuity, it was held that the heir-at-law was entitled to the residue of the term by a resulting trust. This case is an authority to support the limitations for lives in being in the present case, even if the more remote gifts should not be supported; and even though (which is very unlikely) it could, consistently with the law as it now stands, be established that the term of twenty years, in reference to the

trust of that term and the mode of enjoyment, is too remote, the doctrine of *\*cypres* must support the limitation for the lives in being. If

it be objected that this testator makes, not only the father and the son, but likewise the grandson and the great grand-son, all tenants for life in succession, and that these remote gifts have, as in ordinary cases, a tendency to a perpetuity, the answer is that it is a fallacy to apply the rule to the gifts in this case. The plan of the will is different. The gifts are only for existing lives, named in the will, and twenty years beyond the death of the survivor: and it cannot be said, truly and consistently with attention to legal accuracy, that the gift has reference to the life of the first taker, or of any other person who may take to the most remote period of both terms. At the death of one first donee, the next taker is, by express terms, to come into the enjoyment, and is, unquestionably, by express terms, brought into the enjoyment for a period determinable, not only with his own life, but (and this is most important to the decision,) a period determinable with the terms of years, and these terms must determine with lives of persons in being, and twenty years. It will, probably, be admitted that there is not any objection to the limitations so far as they relate to lives in being, and that the objectionable part is the last term of twenty years. Even if that objection were admitted, it would affect the trust only as to the term of twenty years, because the trust, so far as it is good, must be executed. Granting, therefore, for the purposes of the argument, that the term of twenty years was improperly added, and that the limitations do, to that extent, contravene the law against perpetuities, and that the gift of the freehold and inheritance is, by reason of the term, too long suspended,

still the enjoyment of the intermediate takers is not, during the first term, [\*201] \*determinable with lives, exposed to objection. Although the ulterior gifts be void, the will is so framed that the other parts of the will may be good. The first part of the will, which directs an accumulation for twenty-one years, may be good, and also the second part, which gives the enjoyment to lives in being, although the third or ulterior gift of the freehold and inheritance may be wholly void as against the heir-at-law. On the other hand, if the limitation for twenty years is also good, then the inheritance is well given in equity, because it might be well given at law in the same form. And if the inheritance be well given, then the residue of the personal estate is also, for this purpose, well given. If however, it should be held, that the freehold and inheritance are not well given, then unquestionably it must be conceded that the heir-at-law is, at the testator's death, entitled to the benefit of the gift which fails. It will be contended that, although the gift, as to the personalty,

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should fail, still there is nothing to impeach the validity of the trust, which directs the personalty to be laid out in the purchase of real estate. It is understood that the parties who attempt to impeach the limitations in this will mean, on the authority of *Tregonwell v. Sydenham*, already cited, to contend that, although the gift of the personalty should fail, there is a sufficient indication of the intention of the testator to purchase real estates with the personalty, so as to give his heir-at-law the benefit of that direction and of that trust. Nothing of this sort was decided in *Tregonwell v. Sydenham*, or in any other case in which a trust has been created for the benefit of other persons, and ultimately, perhaps, for the heir-at-law, but not in his character of heir. The gift here is to each of the persons, mentioned in the \*preceding clause, for nine- [\*202] ty-nine years, if he should so long live and the terms of one hundred and twenty years, and twenty years, or either of them, should so long continue. It next prescribes the mode of enjoyment, and is to be, in succession, to each person for ninety-nine years, if he should so long live, determinable with the terms; and, after the determination of the respective estates of the first and other sons of George Bengough, and of the persons who for the time being shall be, or who, in case of the death of his parent, would be heir-male of the body, there is finally a trust for the persons who may be heirs-at-law. But this last trust is not to the heirs as heirs. The testator gives nothing to the heir *quasi* heir, as heir and claiming by descent, but uses the word as *descriptio personæ*. The testator having directed the mode of enjoyment during the period of the terms and the suspension of the gift of the inheritance, next directs the mode in which the inheritance shall be conveyed. He prescribes that, from and after the expiration or other sooner determination of the term of one hundred and twenty years, determinable as aforesaid, and twenty years, the trust estates should be settled, conveyed and assured by the then trustees to and upon such person or persons as would, at that time, be entitled to the same, in case they had been devised in a stated manner, viz. in strict settlement. The period at which this conveyance is to be made, and when the suspension of the inheritance is to end, is, by this arrangement, brought within the limits of the rule prescribed by law against perpetuities; for it is to be at the end of one hundred and twenty years from the death of the testator, determinable with lives in being, and twenty years (not the full term of twenty-one years, which might have \*been taken) beyond that period. In effect, on the [\*203] death of the survivor of several lives, and twenty years from the death of the survivor. If it be objected as to the term of twenty years, that there cannot be any absolute term beyond the lives in being, unless with reference to minority, how can such a proposition be reconciled with the case of *Lloyd v. Carew*,(y) which allowed the validity of a limitation after lives in being and a term of one year certain, not having any reference to minority? And if a term for one year certain can be taken without reference to minority, a limita-

(y) Show. P. C. 137.

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tion over must, consistently with the rule against perpetuities, be good, unless the term exceeds twenty-one years. The leading object of this testator in framing this will was to bring it within the rule against perpetuities, and to prevent the vesting of any estates of freehold or inheritance, within these limits, in any of the parties to whom gifts are made. A vesting in the mean time would have defeated his great purpose. Many clauses and declarations were introduced with the view of expressing that intention, and excluding all inference and construction to the contrary. Until the period shall arrive when the conveyance is directed to be made, it is impossible to ascertain the precise person who shall answer the description which the testator gives of him to whom that conveyance is to be made. If the limitations had not been so framed, it might have happened that his intentions might have been defeated by a fine with proclamations.

To leave no doubt as to his intention, the testator has introduced [\*204] several ancillary clauses; and he declares \*that the limitations used in describing the person to whom the conveyance is ultimately to be made, are used, merely and simply for the purpose of ascertaining the person, and not for the purpose of making any immediate devise or gift to them, or raising any immediate estate in the freehold and on the inheritance, by way of trust or otherwise, and that heirs, or heirs of the body, are to take as purchasers. This was done to avoid the operation of the rule in *Shelley's case*. The power given to the trustees to convey, to each person in succession who is to have an estate for ninety-nine years if he shall so long live, an estate for life, was inserted for the purpose of enabling them to give to such persons a qualification to sit in parliament, or exercise those other privileges which belong only to persons in whom an estate of freehold is vested. The clause as to the personal estate is in conformity with the other clauses, which direct purchases to be made of real estates out of the accumulated rents and profits.

On the whole, therefore, this will must be construed without regard to the providence or improvidence of such complex limitations. It must be construed according to the rules of law, as they now stand. The proposition on which the will mainly depends is, the rule of law that any man may, in the most express terms, limit his property so as to suspend the vesting of it for any number of lives in being and twenty-one years after the determination of those lives. That is the utmost limit; and no gift is too remote which does not transgress that boundary. To say that the rule is that the suspension can only be during lives in being and a period of minority, is not recognized by any authority, and is in direct opposition to the decision of the house of [\*205] lords in *Lloyd v. Carew*, and in \*direct opposition to the certificate of the judges of the court of common pleas in *Beard v. Westcott*, and also (it may be safely said) to the certificate of the judges of king's bench in that case. With respect to gestation, some argument may, perhaps, be raised: it may be said, if a period is allowed for gestation, with reference to birth, why is not the period of twenty-one years to have reference to minority? The two

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cases are perfectly distinct. Gestation has reference to a person who is *in esse*, for it is now settled that, for all purposes of benefit, a child in the womb is a person *in esse*, and can, as such, take by description.

To sum up these observations :—In the first place, the gift for accumulation during a period of twenty-one years is good, as, independently of the common law, founded on and governed by the statute 39 and 40 Geo. 3, c. 93.

*Secondly*, The gifts for enjoyment during the period of suspension of the freehold and inheritance are good, because they are all confined to ninety-nine years, if the parties respectively shall so long live, and if the terms of one hundred and twenty years and twenty years shall so long continue.

*Thirdly*, The gift of the freehold and inheritance of the estate, to take effect on the determination of the terms of one hundred and twenty years and twenty years, is not too remote; because the first of these terms is determinable with lives in being at the death of the testator; so that the whole period of suspension is only for a certain number of lives in being, and twenty years after the death of the survivor; \*and therefore within the limit [\*206] which the law has by its rules prescribed against the inconvenience of perpetuities.

Mr. Wilbraham, for the same trustees :—The law allows the inheritance to be suspended without inquiring as to the purpose, or requiring that it should have any reference to the person who is ultimately intended to take the estate. From the earliest period, estates have been allowed to be limited, not for the life which is to enjoy them, but *pour autre vie*. If, therefore, an estate might be limited to a person, without reference to the beneficial enjoyment, when the law afterwards permitted limitations to be extended to the term of twenty-one years after lives in being, there is the same reason for allowing the twenty-one years to be taken without reference to the person to enjoy the benefit. The term of twenty-one years obviously has reference to minority, on account of the disability of the object of the gift. Now a leasehold estate may be rendered unalienable as long as a freehold. But, in applying the principle to the case of leaseholds, it entirely fails; because an infant has the power of disposing of a leasehold estate, by will, at the age of fourteen; nevertheless it never was disputed that a term of twenty-one years, to commence after lives in being, might be created out of a leasehold estate. The very terms in which the rule is constantly stated exclude the reference to minority. For it is not said, "that the gift must take effect within the period of a life or lives in being and the period of minority afterwards," but "during a life or lives in being, and twenty-one years afterwards." And it appears, from the 39th and 40th Geo. 3, c. 93, that \*the legislature considered the period of minority and the [\*207] term of twenty-one years as equivalent to each other. Next, as the terms of one hundred and twenty years and twenty years are confined to the period of which the law prescribes, those terms are well created, and consequently, the limitations which are to take effect on the determination of those terms are valid.



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Mr. *Swann*, who appeared for the other trustee, declined to offer any argument to the court.

Mr. *Sugden* and Mr. *Lynch* appeared for the personal representative of Mrs. *Ricketts*, who was one of the testator's next kin:—Mr. *Sugden*.—The limitations in this case are clearly beyond the limits which the law allows. On the other side it is argued that the accumulation for the first period is good by the statute. Then it is said that the terms for one hundred and twenty years and twenty years are good; and, therefore, that all the limitations to take effect within their duration are also good. Again, it is contended that the inheritance is suspended (which it is strange should be admitted, as it is an objection to all the limitations,) and that, at the determination of the terms, the inheritance is to become vested in some person or other; but who that person is to be, it is admitted that, at present, it is quite impossible to say. This is the greatest attempt at a perpetuity that was ever made; greater than in *Thellusson's case*. For it is admitted that eighty or ninety years hence, and not sooner, will be the time for discussing who the person is in whom the inheritance is to vest. The whole object of the will is, clearly, to establish a perpetuity. It is said [\*208] on the other side, that the limitation should be considered separately.

But the proper course is, to consider whether the limitations, all taken together, are not void as an attempt at a perpetuity. It has been asserted that the 39th and 40th Geo. 3. c. 98, is a legislative declaration that the term of twenty-one years may be added as a positive term. But that is not the true construction of the act. It is expressed in the alternative, and provides that no accumulation shall take place except for the life of the grantor, or the term of twenty-one years from his death, or during the minority of any person who shall be living, or in *ventre sa mere* at the time of the grantor's death. It makes nothing lawful that was not so before. The object of the legislature was to restrain the improper use made of the rule that allowed accumulation to be co-extensive with the suspension of the limitations, and to confine it within the more limited period. But if the construction now contended for be right, the act would, in fact, allow accumulation for a longer period than was before permitted. It was decided, in *Marshall v. Holloway*,<sup>(z)</sup> that you cannot have a general clause of accumulation during the minority of every person who may become entitled under the settlement, but must confine it to some limited period allowed by law. In deciding this case, Lord Eldon, C. followed the case of *Lord Southampton v. the Marquis of Hertford*,<sup>(a)</sup> in which it was held that it was impossible, in such a case, to divide the clause, and to hold the will to be operative upon those persons who were minors and [\*209] in *esse*, and therefore within the rule of law, from those who were without the rule of law, as being born at too remote a period, and that therefore the clause was altogether void. It is clear therefore that this will cannot derive any aid from this act of parliament.

(z) 2 Swan. 432.

(a) 2 V. &amp; B. 54.

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This testator has, through the medium of the terms of one hundred and twenty years and twenty years, attempted to establish a perpetuity: and that attempt, like every other of the same nature, must fail. The limitations which are to take effect during the continuance of these terms would be instantly declared void in a court of law: and it is not in the power of a court of equity to give validity to any limitations of the equitable interest which would not be good if they were limitations of the legal estate. An estate may certainly be limited to an unborn son: but if there is one rule more solemnly settled than another, it is that you cannot limit a succession of life estates to an unborn son, and the sons of that unborn son.

To try the validity of these limitations let them be considered as legal and not as equitable limitations. The first, which is the terms of twenty-one years, created for the purpose of accumulation is allowed to be authorized by the statute. Then comes the gift to the nephew George for ninety-nine years, if he should so long live, and if the terms of one hundred and twenty and twenty years should so long continue. So far it is good. After the death of the nephew it is given to his first and other sons for ninety-nine years, if the same two terms so long endure. This brings the gift to unborn sons, which is also good. But then there is a gift to the unborn sons and their issue, in succession, for ninety-nine \*years, if they so long live and [\*210] the two terms shall so long last. There is a clear authority that such a limitation is void, *Somerville v. Lethbridge*.<sup>(b)</sup> That case decided that limitations to a succession of unborn sons, for ninety-nine years if they should so long live, are all void beyond the limitation to the first unborn son. If this will therefore had been prepared without the insertion of those material words, and if the terms of one hundred and twenty years and twenty years shall so long continue, no lawyer could have contended for a moment that the limitations were not altogether void. Continuing then to consider these as legal limitations, after the twenty-eight lives drop and the term of twenty years, which is a term in gross, ends, at that remote period, the person is to be ascertained who is to take the inheritance as a purchaser. And who is he to be? He is to be the person who would have been entitled in case the estate had been limited according to that course of limitations which the law allows. It is not, therefore, until that remote period that the testator adopts the course of limitations which the law sanctions. If these had been legal limitations would they have been good? It is clear they would not. Is then the law against perpetuity to be evaded by such machinery as this? The law has said that a succession of life estates cannot be given to unborn issue; and yet, if the limitations of this will are to be supported, there is a contrivance by which any testator may easily evade the rule of law. The reason why the legal estate in fee-simple is, by this will, vested in trustees is, that it was felt that there was no chance of supporting the \*limitations if [\*211]

(b) 6 T. R. 213.

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they have been made of the legal estate. The first step of the testator towards evading the rule of law is, to dispose of the legal fee; and then he makes the equitable interest the subject of his attempt at a perpetuity. But the rule, that equity follows the law, must defeat that attempt. The whole fee-simple being vested in trustees, the limitations are still more objectionable than if they had been legal interests, because there is no division of the inheritance. The trustees have no particular estate.

The entire equitable interest is disposed of; and the limitations of it must be subject to the same rules as the limitations of the legal fee. This testator, after vesting the legal fee in the trustees, proceeds to dole out the equitable fee amongst his family. He makes his nephew George, tenant for ninety-nine years, if he should so long live; he gives similar interests to the elder son, grandson, &c. of that nephew, in succession; and, after the dropping of twenty-eight lives, and the expiration of a term in gross of twenty years, computed from the death of the survivor, he gives the inheritance to the person who would have taken it under the common limitations. Unless the mode of limitation can alter the rule of law, it is impossible that such a will can be supported.

If these limitations are clearly bad, it is impossible to make them effective by inserting limitations for a term of one hundred and twenty years, if twenty-eight persons, or any of them, shall so long live, and for a term of twenty years beyond that; because these latter limitations have no apparent operation and exist no where but on paper. No such limitations were \*ever be-  
 [\*212] fore attempted; and although it has been stated that there are in existence drafts, prepared by lawyers whose names cannot be mentioned without the greatest respect, which contain limitations that are very remote, yet no instance can be produced of their having been actually used in practice.

As to the cases which have been cited as authorities for the validity of this will, none of them go to the extent stated in the argument. And it is impossible to refer to the history of the law on this subject without being surprised at the slow progress which it made; for the *Duke of Norfolk's case* is not of great antiquity; and yet the whole question there was whether limitations over confined to lives in being, were void. The case of *Lloyd v. Carew* (b) certainly goes further than any other that has been decided. But it is impossible to take it as an authority to support the limitations in this will. The limitation over, in that case, was to take effect upon the failure of issue living at the death of the survivor of the husband and wife: and the period of twelve months was allowed, merely to give time for payment of the 4,000*l.*, which was a condition imposed on the object of the limitation over. But the period when the limitation over was to take effect, was the failure of the issue of the marriage upon the death of the survivor, and not at the expiration of twelve months after that event.

It is clear that, if there was not a failure of issue at the death of the sur-

(b) Show. P. C. 137; S. C. Prec. Ch. 72.

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vivor, the limitation over could \*never operate. And even looking at [\*213] this case in the point of view most favorable to the limitations in this will, it authorizes the addition of twelve months only to lives in being at the period within which the limitation over must have effect; and those twelve months added for a specific and reasonable purpose. In the *Duke of Norfolk's case*, Lord Nottingham said that he would stop wherever any inconvenience appeared: that is the true principle. In *Lloyd v. Carew* it was argued, on one side, that the courts had never gone beyond lives in being (as they certainly never had;) and, on the other, that there was no inconvenience in allowing twelve months for payment of the money. Yet the court of chancery, the chancellor being assisted by the C. J. of the common pleas and another judge, decided against the validity of the limitation. It was, however, supported by the house of lords. But no such proposition was advanced throughout the whole case, not even in argument, as that a period of twenty-one years after lives in being might have been interposed before the limitation over. The case of *Taylor v. Biddal*(c) turned merely upon infancy. No case that ever occurred excited more attention, or was more elaborately argued, than *Stephens v. Stephens*:(d) and it has always been considered as one of the most leading cases in the law; yet it is plain that none of the counsel or judges, at that time, had any notion that a limitation to take effect after lives in being and a further term of twenty-one years as a term in gross, could be supported. The certificate of the judges contains the following sentence:—"However unwilling we may be to extend \*executory devises [\*214] beyond the rules generally laid down by our predecessors, yet, upon the authority of that judgment (*Taylor v. Biddal*) and its conformity to several late determinations in cases of terms for years, and considering that the power of alienation will not be restrained longer than the law would restrain it, viz. during the infancy of the first taker, which cannot reasonably be said to extend to a perpetuity; and this construction will make the testator's whole disposition take effect, which, otherwise, would be defeated, we are of opinion that the devise before mentioned may be good by way of executory devise." In the case of *Long v. Blackall*(e) there was no reason why the opinion of the court of king's bench should have been taken, if the rule was that a good limitation could be made to take effect after lives in being and a whole period of twenty-one years from the determination of the lives; for the question there was as to the allowance of a few months for gestation. So in *Routledge v. Dorril*(f) there was an unlimited power given to a parent to appoint to her issue; and the court was of opinion that an execution of the power would be void unless it were confined to persons *in esse* at the death of the parent. Neither in that case nor in any other was it thought possible to add a term of twenty-one years after lives in being as the period within which a limitation over could be made to take effect. In *Jee v. Audley* (g) the bequest over to

(c) 2 Mod. 289; 1 Eq. Ab. 188.

(d) Ca. Temp. Talb. 228; 2 Barnardist. 376.

(e) 7 T. R. 100.

(f) 2 Ves. jun. 357.

(g) 1 Cox. 324.

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the daughters of John and Elizabeth Jee was held to be too remote, as it extended to daughters who might be born after the testator's death. The will in *Thellusson's case* did nothing in comparison with what is attempted [\*215] here. \*It merely directed an accumulation for nine lives then extant, and the estate is then to vest in possession. So that there is no term of twenty-one years, no time for gestation, and no terms of one hundred and twenty years and twenty years. If the limit allowed by law is such as is contended for, *Thellusson's case* would not have occupied three minutes in argument.

8th March.—In the case of *Crooke v. De Vandes*,<sup>(h)</sup> the question was upon the remoteness of a limitation which was to take effect at the end of an absolute term of thirty years after the testator's death; and the Lord Chancellor was of opinion that it was a void limitation, and he so decided.

I will now, in addition to the authorities, show to the court what has been the opinion of all the judges at the several times in which this question has been agitated. And I will undertake to show that, although there may be, in some of the books, a general statement, by a judge in his judgment, that the utmost term allowed is lives in being and twenty-one years, yet that it cannot be considered that he intended it to be taken as a term in gross: all that is meant is, that it is the utmost limit; but it is never said that that term must not be measured by something else.

The law originally allowed estates to be limited *pour autre vie*: and, as it considered an estate to a man for his own life to be greater in value than an estate to him for the lives of a thousand other persons, it allowed limitations to be made for any number of lives. But \*when you measure a life against any other given number of lives, not with reference to the value of the estate in point of limitation and in point of law, but in point of duration, it is absurd to say that a thousand lives are not of more value than a single life. The law then having allowed of the creation of estates for any number of existing lives, it was afterwards converted to the purpose of a limitation, without reference to the lives which were to be the measure of enjoyment. But this could not be the case with respect to the term of twenty-one years: for that term, taken as a term in gross after lives in being, has reference to nothing; there is nothing to which you can refer it, except the minority of the party. The rule laid down by every judge who has spoken on the subject is, that an estate may be rendered unalienable during lives in being and twenty-one years and a few months, allowing for gestation. As then those few months are allowed for gestation, must not the twenty-one years be allowed for minority? Medical men are not agreed as to the exact period of gestation. Some of them allow even twelve months. So that if the additional months have no reference to gestation, the term may be extended to twenty-two years absolutely. For if the twenty-one years are not measured by minority, how

(h) 9 Ves. 197.

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can the additional months be measured by gestation? It would be absurd to say that that which flows from, or is ancillary to, the former term, is to be considered as having reference to gestation, but that the term itself is to be an absolute one, without reference to any event. It has been said that the term of twenty-one years could not have been chosen with reference to minority and the disability of alienation attendant upon it, because the same term has been fixed upon as to leaseholds, \*to which the reason does not [\*217] apply; as an infant may dispose of a leasehold estate at the age of fourteen. This, however, proves nothing: for though an infant may dispose of a leasehold estate by will, he cannot by contract. Besides the rule by which the same term was allowed, both with respect to leaseholds and freeholds, was founded in convenience: for estates generally consist of both species of property, which cannot be separated without great disadvantage; and therefore the same rule was applied to one as to the other, although the same reason for it did not exist.

I will now call the attention of the court to what has been said, by successive judges, on the question whether or not the term of twenty-one years can be taken as a term in gross: and Lord Alvanley is the only judge who has expressed his opinion on this question explicitly.(i) In *Thellusson v. Woodford*,(k) Macdonald, C. B. in delivering the opinion of the judges, states the rule in this way: "With an easy interpretation, we find from Lord Nottingham what that tendency to a perpetuity is which the policy of the law has considered as a public inconvenience, namely, where an executory devise would have the effect of making lands unalienable beyond the time which is allowed in legal limitations, that is, beyond the time at which one in remainder would attain his age of twenty-one, if he were not born when the limitations were executed." Then he says, in another passage: "I understand him to mean that, wherever courts perceive that such would be the effect, whatever may be the mode attempted, that effect must be prevented; and he gives the same, \*but no greater latitude to executory devises, and to [\*218] executory trusts, as to estates tail. This has ever since been adopted."

And, in another part of the same report, that learned judge says: "the established length of time during which the vesting may be suspended is during a life or lives in being, the period of gestation, and the infancy of such posthumous child." It is quite clear, from these passages, that the chief baron considered the rule to be that the twenty-one years could not be taken as a term in gross. The counsel for the trustees referred to the case of *Long v. Blackall*,(l) as containing the judgment of Lord Kenyon, C. J. in support of their argument. The whole of that judgment, and especially the following passage, is directly in my favor: "it is an established rule that an executory devise is good if it must necessarily happen within a life or lives in being and twenty-one years, and the fraction of another year, allowing for the time of gestation."

(i) See 4 Ves. 337.

(k) 1 New Rep. 386.

(l) 7 T. R. 100.

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The case that was next cited was *Keiley v. Fowler*.<sup>(m)</sup> It appears, from the judgment of Wilmot, C. J. in that case, that it was the opinion of that learned judge that the term of twenty-one years was allowed in the case of infancy only. The same doctrine is laid down in *Thellusson v. Woodford*,<sup>(n)</sup> and in the reasons offered by the counsel for the crown in the same case,<sup>(o)</sup> particularly in the following passage: "every executory devise is good that does not tend to make an estate unalienable beyond the period allowed by law as to legal estates, which cannot be rendered unalienable beyond the time

[\*219] at which the remainder-man \*who was not in existence at the time of the limitation of the estate would arrive at the age of twenty-one."

There is an opinion of Mr. Yorke's,<sup>(p)</sup> who was very much concerned in all the cases that arose on perpetuities, in which he states that, by way of executory devise or springing use, the inheritance may be suspended from vesting during a life or lives in being, or during the infancy of the first unborn tenant in tail; but it can be suspended no longer. And, in the *Duke of Marlborough's case*,<sup>(q)</sup> we have the reasons for the rule assigned by Mr. Yorke, and they are thus expressed: "this arises from the policy of the law against perpetuities, that the vesting of the inheritance or ownership may not be suspended beyond the compass of a life or lives in being, or beyond the age of twenty-one years of the first unborn tenant in tail, during whose infancy the law itself will restrain his power of alienation."

When Lord Avonley, M. R. came to give his opinion to the Lord Chancellor, in *Thellusson's case*, it having appeared to him that Mr. Justice Buller had laid down the rule in a way that would authorize the taking of the term of twenty-one years as a term in gross (although on looking accurately at the whole of the learned judge's argument, it will, I think, appear that he did not mean so to lay down the rule,) his lordship was so strongly impressed that the rule was otherwise, that, although it was not necessary to decide the point, he could not refrain from stating, in the following words, what his view of

[\*220] that point was: <sup>(r)</sup> "as to \*the period of twenty-one years (speaking of the learned judge who decided *Long v. Blackall*) that could not be his meaning; nor, with submission to the learned judge who immediately preceded me, has it ever been considered as a term that may, at all events, be added to such executory devise or trust. I have only found this *dictum*, that estates may be unalienable for lives in being and twenty-one years, merely because a life may be an infant, or *en ventre sa mere*: therefore, I am clearly of opinion, that that expression cannot be held to mean more than children in the womb at the testator's death."

Then came in the case of *Beard v. Westcott*, which was twice argued in the court of common pleas. When the cause was brought on before the Lord

(m) Wilm. 206, 307.

(p) 2 Ca. & Op. 440.

(r) 4 Ves. 337.

(n) 4 Ves. 260 & 264.

(q) 3 Bro. P. C. 245; Thomlin's Edit.

(o) See 1 New Rep. 379.

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Chancellor, upon the judges' certificate, his lordship, though not without reluctance, granted a case to the K. B. The judges of that court returned their certificate, and the Lord Chancellor confirmed it.<sup>(s)</sup> This decision was made at the close of all the authorities : it has not been appealed from, and cannot be shaken.

Some reference has been made to text-writers. Mr. Fearn's opinion has been referred to in support of these limitations. After stating many of the cases that have been cited in the course of this argument, he draws the rule thus : "The limitations in the two last-cited cases were confined to vest within a certain number of months after the end of a life in being. But these are not the utmost limits allowed for executory devises ; for the courts have gone as far as to \*admit of executory devises limited to vest [\*221] within the compass of twenty-one years after the period of a life in being. That was admitted in the case of *Taylor v. Biddal*."<sup>(t)</sup> And then he cites those cases in which twenty-one years were admitted for the purpose of infancy. In no one passage of his book does he speak of the question : nor did it occur to his mind, as one that could be raised, whether the term might or not be a term in gross. That passage, therefore, cannot be considered as an authority upon the subject.

The case next cited is *Heath v. Heath*.<sup>(u)</sup> That case has never been denied to be law. But there the term of twenty-one years was not taken as a term in gross, but with reference to the limitations of the estate. A fee is given, if the devisee have issue who survives him and lives to attain the age of twenty-one ; and, in that case, that issue, which is the first line of generation, will take a disposable inheritance, and that fee, which was given for the purpose of descent, will not go over, but remain in the devisee so as to descend to his issue. But if the devisee have not a son who lives to take a disposable right in the inheritance descended from him, then it is to go over. And that is as clearly within the rule now contended for, as any case which could be put. And, therefore, though so much relied on, it has not the slightest bearing on the case, as opposed to the view of it now submitted to the court. If that be so, it may now be asserted that the rule is, that the term of twenty one years cannot be taken as a term in gross ; and, if it cannot, then, unquestionably, all these limitations fall to the ground. For if \*they are void as [\*222] to the twenty years, they are void as to the lives in being. For, if there be any rule of law more sacred than another, it is that a limitation, which is in itself illegal in point of perpetuity, can not be controlled or corrected. At least it cannot be done here ; as it is all one limitation. For it is to trustees for one hundred and twenty years, during twenty-eight lives, and for twenty years after the death of the survivor. It is impossible to sever them. It is one limitation, and not two. But suppose that the twenty years could be cut

(s) See 5 Taunt. 393 ; 5 B. & A. 801 ; and 1 Turn. & Russ. 25.

(t) Cont. Rem. 431, 7th ed.

(u) 1 Bro. C. C. 147.



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off, what would become of the limitation over? For that limitation is not upon the determination of any term of the former limitation, but is to take effect when the one hundred and twenty years shall expire by the determination of the lives, and the twenty years after shall end. Then when is the limitation over to operate? At the end of the lives? That is contrary to the testator's direction. By the law of the country, no judge has the power of saying that that which is not to arise till the end of certain lives and twenty years after, shall arise at the end of the lives, without waiting for the expiration of the twenty years. If the limitations have gone too far, and cannot be sustained in point of law, then, according to *Beard v. Westcott*, they are all void. Suppose, for the sake of argument, that the court should be of opinion that the limitation might be severed, and be held good for the one hundred and twenty years, and void for the twenty years, then the case would be precisely similar to *Beard v. Westcott*. For the testator has said that the children of George Bengough, and their issue, to the latest generation, shall, during the existence of the lives and the absolute term of twenty years, take the estate in [\*223] the way he has \*pointed out; and that the right of the person to take, as a purchaser, under the second set of limitations, shall not arise until all the lives shall have dropped, and the twenty years have expired. If then the twenty years are cut off, the consequence will be that there will be persons who would be *in esse* and willing to take, if they could be allowed to do so by law, during the remainder of that term of twenty years; but they cannot take during that term, because it is void; and yet the gift over can not be accelerated, because the testator has said that no person shall take the estates as a purchaser, until the expiration of that term.

Next, with respect to that proviso in the will which authorizes the trustees to give the persons entitled to the income of the estates, an absolute estate of freehold for their lives, instead of an estate for ninety-nine years. This clause makes void, at once, all the limitations. For it enables the trustees to give life estates to the third generation of descendants. It is plain, therefore, that it was the intention of this testator to evade the rule of law, although his professed object is to keep within it. In former attempts at perpetuities, powers were given to the trustees, as a tenant in tail came *in esse*, to restrict him to an estate for life, and to make his sons purchasers. But those attempts invariably failed; and yet it never occurred to any one to confine the exercise of the power to a certain number of lives and twenty-one years after. If the rule be as is contended for, a testator may limit his estate to persons *in esse*, for their lives, with remainders to their issue in tail, and give a power to the trustees to cut down the estates tail into estates for life during the lives [\*224] of all the members of both houses of parliament \*and twenty-one years after the death of the surviving member.

The objection to taking twenty-one years as a term in gross is, that the person, who is to take at the expiration of the term, may be an infant, and thereby alienation be restrained for twenty-one years more, and the analogy

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between limiting estates in strict settlement and by executory devise be destroyed. Whereas if the term be taken with reference to infancy, alienation cannot be restrained for a longer period than twenty-one years after the vesting of the estate; and the analogy is preserved. It is admitted that the limitations of this will, taken abstractedly, would be illegal. But it is said that, because they issue out of a limited interest, or are circumscribed within the terms of one hundred and twenty years and twenty years, they are valid. Although this is stated as an acknowledged rule of law, and is the foundation of the arguments in favor of the will, not even a *dictum* has been or can be produced to establish it. For limitations are to be judged of, with reference to perpetuity, not by the quantity of the interest out of which they are to issue, but by their legal effect; and nothing could be more inconvenient than to hold the same limitations good in one case and bad in another. The only case that has been referred to as an authority upon this point is *King v. Cotton*.<sup>(u)</sup> It is observable, in that case, that the term never could exceed the life of Lady Cotton, and, therefore, the court might have put a different construction on the words "heirs of her body" from what they would have done if the term had been an \*absolute one. But the court came to no deci- [\*225] sion at all upon the validity of the limitation. Suppose an estate held for lives were granted to A. and the heirs of his body, and, for want of such issue to B. and the heirs of his body; could it be contended that the words "for want of such issue" ought to be confined to a failure of issue during the lives, and that, therefore, A. did not take a *quasi* estate tail? No; but in strict analogy to the effect given to the same limitation out of a fee-simple estate, it would be held to give A. a *quasi* estate tail. So if a term of ninety-nine years determinable on the dropping of a life, is granted to a person and the heirs of his body, the grantee takes the entire interest, for this reason, because the same limitation out of an estate in fee-simple would have given an estate tail; and therefore the law, as it does not allow of such an estate in a chattel, would give an interest, as nearly as possible, to the same extent, for the sake of effectuating the intention. Consequently the limitations out of these terms must be governed by precisely the same rules as limitations out of a fee-simple are; and therefore they are void. But suppose that, on account of the limited interest out of which an estate is to arise, a testator may exceed the regular boundary of legal limitation; still these limitations would be void. For here there is no divided estate, but the entire fee-simple is absolutely vested in the trustees.

It is now to be considered how the personal estate is operated upon with reference to the real estate. The personal estate is directed to be invested in land, which land is to be settled to the same uses as the real estate before devised. If then the court should be of \*opinion that the trusts [\*226] which are created of that estate are void, the necessary conse-

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quence is, that the gift of the personal estate would altogether fail ; because the purposes to which the real estate are to be applied, are purposes which are not allowed by law ; and, therefore, the trust would be one not authorized by law, and the next of kin would become entitled to the money. The case, which has been referred to, of *Tregonwell v. Sydenham*, (x) is distinguishable. The court of exchequer, when it became before them, were of opinion that the trust upon which the money was to be applied was void, as being too remote, and that the devisees, who were devisees of the estate subject to the trust-term, would take the estate discharged from the trusts. The house of lords reversed that decision, and held that, although the purposes for which the term was created might be void in law, and therefore, could not be carried into execution, yet, as the rents were severed from the real estate, and directed to be absolutely raised and invested in real estate, the heir-at-law was entitled to have those rents raised and paid to him for his own benefit. It does not appear to have occurred, to the learned persons who decided that case, that the consequence of illegality on account of perpetuity is different, in almost every respect, from that of other invalid dispositions. If an estate for life is given with remainder over, and the persons to whom the life estate is given is incapable of taking it, the remainder is instantly accelerated. But if the particular estate is void on account of perpetuity, there is no acceleration ; and even that which otherwise would be a good remainder, altogether ceases and is void. It would, therefore, seem that there was great occasion to [\*227] \*suppose that the decision of the court of exchequer was right. But, be that as it may, the distinction between that case and the one now before the court is, that this is a case of personal estate to be applied in the purchase of real estate, which is to be settled to uses which are void ; and, therefore, there is no object in making the investment. But, in that case, the rents were portions of the real estate, and, the dispositions being void, the house of lords decided that the heir took that which was taken away from the devisee, and not properly given to any body else. That decision, therefore, has no bearing on the present case. The consequence is that this, being personal estate, must retain its character of personal estate, and the purpose of investment, being such as is not allowed by law, cannot take effect ; and the next of kin are therefore entitled to it, as undisposed of.

Mr. *Lynch* :—The plan by which this testator has endeavored to effect the object which he had in view, is, in substance, that which has, on former occasions, been attempted, but which has always failed, that is, to give successive life estates, or rather estates for years determinable upon lives, not only to persons living at his decease, but to their sons not then born, and to the children of such sons *ad infinitum*, declaring, at the same time, that each person is to take as a purchaser : and the first question is as to the validity of the trusts declared of these two terms of years ; and the next, as to the validity of the terms themselves.

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It is clear, from the cases which have been cited, of *Somerville v. Lethbridge*, and *Beard v. Westcott*, that all the limitations in this case or trusts declared \*subsequent to that to the first son of the plaintiff, are [\*228] void ; and, that being so, that the terms, supposing them to be valid, cannot support trusts in themselves illegal : and, on the other hand, that, if these terms are invalid, the trusts which depend on them must fail. It has, however, been urged that these terms are valid, and are, therefore, capable of supporting trusts in themselves invalid. But that cannot be : for you cannot effect by indirect means, that which cannot be done by direct means ; and if these terms are introduced into his will for no other purpose than to evade the law, they cannot be supported, and cannot support trusts in themselves illegal. Terms for years are generally introduced into wills and marriage settlements for the purpose of raising portions or charges, or other sums of money, in order to provide for the necessities of families. The terms for years are not introduced into this will for any such purpose. The legal estate is not conferred on trustees, distinct from the holders of the inheritance, in order that they may raise a sum of money to provide for the necessities of a family. The whole legal fee simple is vested in the trustees, and they are merely directed to stand possessed of a portion of the inheritance for the terms of one hundred and twenty years, and twenty years. But they have no duty to perform : and the only purpose for which those terms are created, is to evade the law.

If the testator did not wish to confer the legal estate on his devisees, no thing could have been easier for him than, after giving the legal estate in fee-simple to the trustees, to declare the trust. Those trusts would have been for the plaintiff, for ninety-nine years, if he should so long live, with remainder to his son, for \*ninety-nine years, if he should so long live, [\*229] with remainder to his heir male for ninety-nine years, if he should so long live. But the framer of this will knew well that such trusts would be as void in equity as a limitation to the same effect would be void in law : and and therefore it was that he introduced into this will what may fairly be called a contrivance to evade the law. Suppose a legal term of years had been created, and that the trustees of it were to raise a sum of money for the benefit of a person at the age of thirty ; such a gift would be void according to the case of *Crooke v. De Vandes*. It was not contended there, and could not be contended in the case put, that the validity of the term could support the validity of the gift. Supposing then these terms to be valid, they cannot support gifts which are, in themselves, illegal. If the court puts the two terms out of its consideration, and views the will as if they had not been introduced, there is an end of the question.

The boundary fixed by the law for an executory devise is, a life in being and a term of twenty-one years. But that term cannot be a term in gross ; but must be with reference to the minority of the person from whom the estate is to go. There is another qualification, and a very reasonable one, to be annexed to this rule, which is, that a testator, availing himself of the indulgence of

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the law in allowing him to limit his estate at all by way of executory devise, is not to commit a fraud on that indulgence, as the testator in this case has done; by the use which he has made of these two terms, and by the number of lives upon which he has made the term of one hundred and twenty years to [\*230] depend. They are twenty-eight in \*number, and eleven of them entirely unconnected with the persons intended to take beneficially.

In *Thellusson's case* it was argued that the testator had, in fact, substituted years for lives, and thereby committed a fraud on the indulgence of the court. There the lives for which the accumulation was directed were nine only; and the *cestui qui vies* were immediately connected with the enjoyment of the estate. Here the testator has openly substituted years for lives. He might as well have taken the lives of all the inhabitants of North and South America as the twenty-eight he has taken, eleven of whom are perfect strangers to the persons who are beneficially to take.

It is almost unnecessary to refer to *Lade v. Holford*,<sup>(y)</sup> where the probable suspense of property for twenty-six years was held to be illegal; and in *Proctor v. The bishop of Bath and Wells*,<sup>(z)</sup> the probable suspense of property for twenty-four years was held to be invalid.

Macdonald, C. B. in delivering the opinion of the judges in *Thellusson v. Woodford*, says: "But it is asked, shall lands be rendered unalienable during the lives of all the individuals who compose very large societies or bodies of men, or where other very extensive descriptions are made use of? It may be answered that, when such cases occur, they will, according to their respective circumstances, be put to the usual test whether they will or will not tend to a perpetuity, by rendering it almost, if not quite, impracticable to ascertain the extinction of the lives described, and will be supported or avoided accordingly."<sup>(a)</sup> And, in speaking \*of the passages which have been already cited from Lord Nottingham's report of the *Duke of Norfolk's case*, he says: "With an easy interpretation, we find from my Lord Nottingham, what that tendency to a perpetuity is, which the policy of the law has considered as a public inconvenience, namely, where an executory devise would have the effect of making lands unalienable beyond the time which is allowed in legal limitations, that is, beyond the time at which one in remainder would attain his age of twenty-one, if he were not born when the limitations were executed. When he declares that he will stop where he finds an inconvenience, he cannot consistently with sound construction of the context, be understood to mean where judges arbitrarily imagine they perceive an inconvenience; for he has himself stated where an inconvenience begins, namely, by an attempt to supersede the vesting longer than can be done by legal limitation."<sup>(b)</sup> Gilbert, C. B. in his *Treatise upon Uses*, lays down what a perpetuity is: he says, "1st, That all limitations that tend to the provision of the family, and to secure against contingencies that are within the parties' own immediate prospect, are to be favor-

<sup>(y)</sup> Amb. 479.<sup>(z)</sup> 2 H. Black. 358.<sup>(a)</sup> 1 N. R. 388.<sup>(b)</sup> 1 N. R. 386.

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ed, 2dly, all limitations that perpetuate or tend to perpetuity are, in themselves, void and repugnant to the policy of the law.”(c)

Is it possible for any one, upon reading the limitations contained in this will, not to see that they are exactly those to which Chief Baron Gilbert alludes as tending to a perpetuity.

\*There is another objection to these limitations—an objection at law, [\*232] independent of that which arises on the executory devise. They are limited to children of unborn persons, and, therefore, come within the rule that a possibility cannot be limited upon a possibility. On these grounds, therefore, it is submitted that these trusts are illegal, and, being illegal, that they cannot be supported by these terms, even supposing they are legal, and not used as an evasion of the law.

The next point is, with respect to the term of twenty years, which here is taken as an absolute term. Lord Eldon, C. in delivering his judgment in *Griffiths v. Vere*(d) says: “We all know the origin of this act.(e) Previously, I conceive, the law upon this point to have stood in this way; that you might by executory devise prevent an estate from vesting during a life or lives in being, and twenty-one years, and a small portion of time, the period of gestation.” It is clear that Lord Eldon coupling the twenty-one years with the few months allowed for gestation, clearly referred to minority.

It has been argued that, because by the 39th and 40th Geo. 3, c. 98, accumulation is allowed for an absolute period of twenty-one years, a suspension of the vesting of the inheritance should be allowed for that period. But that act was passed for the purpose of regulating accumulation only, and does not in any way affect the rule with respect to the suspension of the vesting of the inheritance. If that be the case, \*there is an end to the [\*233] term of twenty years; and the term of one hundred and twenty years must fall with it, because it is ingrafted on it, and they both constitute one term: or, at least, the trusts declared, jointly, of both these terms, cannot be carried into effect. For here is one period composed of both terms, upon which the testator says certain trusts are to arise. That period exceeds the boundary assigned by law, and therefore all the trusts must fail. *Ld. Southampton v. The Marquis of Hertford.*(f) *Marshall v. Holloway.*(g)

To decide the contrary would violate the intention of the testator; for he never meant that the trusts should arise upon one term and not upon the other; but has declared that they should arise upon that period which was constituted of both terms. If, therefore, these terms are in themselves illegal, if they are introduced merely as an evasion and contrivance, and if this term of twenty years is altogether void, and the trust of both terms is in consequence void, it is admitted on the other side, that the direction to convey the inheritance at the expiration of the term of one hundred and twenty years is altogether void.

(c) *Gibb. on Uses*, 3d edit. 259, 260.

(f) 2 V. & B. 54.

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(d) 9 Vos. 131.

(g) 2 Swan. 432.

(e) 39 and 40 Geo. 3, c. 98.

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For it is quite clear that the remainders that are to take effect after the estates which are considered too remote, also fail. That is decided by several authorities, but, particularly, by the late case of *Beard v. Westcott*. The consequence, therefore, is, that none of these trusts can be carried into execution, and, therefore, the real estate has descended to the heir at law, and the personalty belongs to the next of kin.

[\*234] \*Another question in this case is, whether, in consequence of the direction to lay out this money in land, the heir at law, and not the next of kin, is to take it. The direction itself, no one can deny it, is legal; but, if there is no object for which the direction can be carried into execution, there is no necessity for laying out the money in land, or considering it as land: but the court will consider the case as if there were no such direction given. But if the court shall consider that this direction is to be carried into effect, then the next of kin will take it as land. In *Smith v. Claxton*,<sup>(h)</sup> where the converse of this proposition was discussed, all the cases on that point were considered; and there it was decided that, if a testator directs real estate to be sold for certain purposes, and those purposes altogether fail, the heir would not only take it, but would take it as land. The testator has directed his personal estate to be laid out in the purchase of land, for a purpose which has altogether failed: and, therefore, the next of kin will take it, and they will take it as personalty, and not as realty. It makes, however, very little difference to them whether they take it as personalty or as realty. But, under the circumstances of the case, they take it as personalty. With respect to the trust for accumulation, if the other trusts are void, the accumulation altogether ceases. As to the accumulation, there is no objection to it, it is an accumulation allowed by the act; but if the trusts are altogether void, the accumulation becomes unnecessary. On the grounds stated it is submitted that none of these trusts can be carried into effect, and, therefore, that the next of kin are entitled to the property as personal estate.

[\*235] \*Mr. *Horne*, Mr. *Shadwell*, and Mr. *Rolfe*, appeared for Mr. *Cadell*, the executor of the testator's widow.

Mr. *Horne*.—The question for the consideration of the court is, whether, taking the whole of this will together, it is not a fraud upon the law against perpetuity. Not one of the terms which this testator has affected to create, has any existence for any purpose but to evade the rule of law. The trustees of the terms have in them the whole legal and equitable fee. The terms exist on paper only; in fact, they are all merged in the fee.

In the first place, there is a direction for accumulation. Now it is not disputed that an accumulation may be good for twenty-one years. But if the only purpose of the accumulation be to further the ultimate purpose of the will, and that purpose be to evade the law against perpetuity, and therefore cannot take effect, the trust for accumulation must necessarily fail with it.

(h) 4 Madd. 484.

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The object is to give, through the medium of these fictitious terms, the estates to be enjoyed according to a course of limitations which, taken by themselves, would be bad, and to prevent those from having the power to alienate, who, but for these terms, must take estates, which, by the general policy of the law, are alienable. Though the rule of law be, that no disposition shall be good by which alienation may be suspended for a period longer than a life or lives in being and twenty-one years after; yet the converse of this rule is no where laid down, that every suspension during that period is good: but whatever tends to a perpetuity, or is within the mischief of it is, whatever may \*be the ingenuity with which the particular instrument has been [\*236] framed, a case for the interference of the court.

In former cases the question has been, who was the person who, at a limited period after the testator's death, was to take the estate? and, in the mean time, it has been always clear either that a different set of persons or nobody at all was to take it. But here the testator means that, from his death, there shall be takers, persons who, from his death, shall be devisees under his will during the existence of those fictitious terms of one-hundred and twenty years and twenty years. These persons are to take, not for accumulation, not for any thing collateral to the testator's general object, but as devisees; and, at the expiration of one-hundred and twenty years and twenty years after, a new taker is not to be sought for: but the person then to take is to be exactly the same as is to take under the previous limitations, and, therefore, the same individual who, under the previous limitations, would be in possession of the estates, as a substantive devisee, taking in the course of succession prescribed by this will.

*Mr. Shadwell.*—It cannot be disputed that a direction to accumulate personal estate for twenty-one years after the death of the testator, considered by itself, is good. But although the trust for accumulation, in this case, is good, having respect to the length of time only during which it is directed to take place, yet, if it is intended for some other purpose which is not good, the trust itself will become void, and, consequently, those who represent the widow and next of kin will be \*entitled (i.) The question then is [\*237] whether, inasmuch as the testator has directed that, at the end of twenty-one years, the accumulated fund shall be laid out in the purchase of freehold estates, to be settled in the same manner as the devised estates, the trusts which are expressed respecting the devised estates, are good.

In the first instance a question arises whether the language in which these trusts are expressed be, itself, intelligible; 1st, as to the term of one hundred and twenty years, if George Bengough and twenty-seven other persons shall so long live. What necessity was there for providing a term of ninety-nine years if George Bengough shall so long live, when that term was to be taken out of the term of one hundred and twenty years if George Bengough and twenty-seven other persons should so long live? The will then proceeds,

(i) *Tregonwell v. Sydenham*, 3 Dow, 194.



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"and after the determination of the estate and interest of each of the same sons respectively, and also, as the circumstances of the case shall require, after the determination of the estate of any person taking, from time to time, under, or as answering the description of heir male of his body : " Whose body is here meant ? The only persons mentioned before are the first and other sons. And then it is supposed that, after the determination of the estate and interest of each of these sons, there may be some son who, from time to time, may have taken under the description of heir male of the body, although no such person is before mentioned, and therefore, that the estate which this person may have taken, shall have determined. And then the will proceeds, [\*238] "in trust for the person who, for the time \*being, and from time to time, shall answer the description of heir male of his body." So that it is, in substance, a limitation in trust for a son for life, and, after his death, and, after the decease of a person answering the description of heir male of the son's body, in trust for a person who answers the description of heir male of his body. So that the estate of the person is to be determined before he takes any estate at all. And then it goes on to say : "or who, in case of the death of his parent, if such death had taken place, would be the heir male of his body, under an estate to be limited to the same son and the heirs male of his body." This seems to point to some other case in which the estate of the person who was to have taken as heir male of the body of the son, shall have determined, and then to the case of some other person who, in the event of the death of his parent, would be the heir male of his body, that is, heir male of his parent's body. But it is not said what estate the parent himself is to take.

The great question, however, is, whether, as the testator has directed the trusts to endure for a term of one hundred and twenty years, during the lives of twenty-eight persons, of whom seven alone are beneficially interested in the estate, those trusts are not void ? In *Griffiths v. Vere*,(k) Lord Eldon, C. in commenting upon the decision of *Long v. Blackall*, says : "Whether the law is according to that decision or not, it was quite a settled notion, previously, that you might, by executory devise, prevent an estate vesting [\*239] for a life or lives in being and twenty-one years, with \*that small addition at the end of the life, subject to all questions as to the inconvenience from the circumstance of selecting a great number of lives, which might be considered *sub judice*." So that Lord Eldon did not mean to say that the proposition is generally true. It is, however, a proposition which those who attempt to support this will, must prove to be generally true. It is obvious that there is a degree of inconvenience arising from the selection of the lives of a great number of persons not connected with the estate. The *Duke of Norfolk's case*,(l) which is considered as the foundation, on which this doctrine stands, was a case decided by Lord Nottingham, having regard to

(k) 9 Ves. 127 ; see page 132.

(l) 3 Ca. Ch. 1 ; see 2 Swan. 454.

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the particular circumstance that there was a convenience in making a family arrangement for the benefit of the persons interested in the estate; and he held that the trusts of the term of two hundred years might be considered as good, having regard to the circumstance that the different persons who were to take a benefit in the trusts of the term, were, themselves, the persons who were to take an interest in the estate devised. Lord Nottingham applies his argument thus: "The equity in this case is much stronger, and ought to sway a man very much to incline to the making good this settlement if he can. It was prudence in the earl to take care that, when the honor descended upon Henry, a little better support should be given to Charles, who was the next man, and trod upon the heels of the inheritance." And he enlarges upon this observation. Again he says: "If then this be so that here is a conveyance made which breaks no rule of law, introduces no visible inconvenience, savors not \*of perpetuity, tends to no ill example, [\*240] why this should be void only because it is a lease for years, there is no sense in that. Now if Charles Howard's estate be good in law, it is ten times better in equity, for it is worth the considering that this limitation upon this contingency happening, (as it hath, God be thanked,) was the considerate desire of the family the circumstances whereof required consideration, and this settlement was the result of it made with the best advice they could procure, and it was as prudent a provision as could be made."(m)

There is no prudence in the provisions of this will. It is an arbitrary, imprudent disposition of property, and not in the least connected with the benefit of those persons who are entitled to take under it.

Mr. Rolfe:—By referring to the different *dicta* on the subject, it will appear how the opinion became prevalent in the profession that, by means of an executory devise, an estate might be limited so as not to vest till twenty-one years after lives in being.

In the first place, it is quite clear that it is of very modern introduction; for, otherwise, that long discussion, and the great difference of opinion which took place in the decision of the *Duke of Norfolk's case*, could not have arisen. That case decided, for the first time, that an executory trust was good if it took effect during a life in being: and, if any idea had existed at that time that it would be good for twenty-one years beyond the life in being, much of the discussion in \*that case could not have taken place. Lord Not- [\*241] tingham did not mean to decide whether a life in being was the ultimate point to which the suspension of vesting might be continued. At that time the case of *Taylor v. Biddal*(n) had just been decided; but it is fair to presume that it was not present to the mind of Lord Nottingham, or of the judges who assisted him, because it was impossible to believe that he would have relied on *Pells v. Brown*,(o) if he had known that, either two or three years before, a case had been decided that went beyond it.

(m) See 3 Ca. Ch. 36 and 51.

(n) 2 Mod. 239; Freem. 243; 1 Eq. Ab. 188.

(o) Cro. Jac. 590.

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The next case on the subject is *Massenburgh v. Ash*.<sup>(p)</sup> But it appears from the facts of that case, that it is not a decision that the term of twenty-one years may be taken as a term in gross.

The next case in point of date is a case not referring to real estate at all, but to personalty, and in respect of which the same principle was necessarily applied. It is the case of *Maddox v. Staines*.<sup>(q)</sup> It is evident, from the judgment in this case, that it is no authority for taking the term of twenty-one years in gross, but that it was decided, like the others, merely with reference to the analogy between the devise to take effect at the end of minority, and a legal limitation to a person for life, with remainder in tail, and which remainder in tail would not be disposable until the party obtained his majority.

Next to that comes the very important case of *Stephens v. Stephens*.<sup>(r)</sup> [\*242] which had the singular advantage \*of obtaining the concurrence both of Lord Talbot and Lord Hardwicke. That, as appears from the judge's certificate, is any thing rather than a decision that a term of twenty-one years in gross was good. The next case is *Goodtitle v. Wood*.<sup>(s)</sup> Some part of the judgment in this case does, at first, appear to support the doctrine contended for on the other side; but, when it is considered, as it ought to be, with reference to the context, it leaves the matter precisely where it found it. This was followed by another decision by Lord Hardwicke, *Sheffield v. Lord Orrery*.<sup>(t)</sup> in 1745. He very evidently there seems to have entertained the same opinion as he asserted, after the greatest deliberation, in the case of *Stephens v. Stephens*, in which there was no mention of the term of twenty-one years as taken absolutely, but as simply referring to the minority of the party who was to take. In the same year there was decided in the court of king's bench, in the time of Lord Chief Justice Lee, the case of *Gulliver v. Wickett*.<sup>(u)</sup> Then comes another case before Lord Hardwicke, *Bullock v. Stones*.<sup>(x)</sup> Now Lord Hardwicke does not seem, from any thing that is said there, to have altered his opinion, or to have suspected that a different rule of law had been established since the decision of *Stephens v. Stephens*. In *Goodman v. Goodright*.<sup>(y)</sup> the court held that the devise over was too remote. In Michaelmas term, 1759, occurred a case that, from the nature and magnitude of the property, and importance of the parties concerned in it, underwent before Lord [\*243] Northington as great discussion as any case ever did, *The Duke of \*Marborough v. The Earl of Godolphin*.<sup>(z)</sup> It appears clear from the judgment, coupled with the expressions used by Lord Northington, that he had the same opinion as his predecessors, Lord Hardwicke and Lord Talbot, entertained, namely, that this term of twenty-one years had never been considered as a term in gross. The next decision is a case by Lord Mansfield, C. J.<sup>(a)</sup> This is a very strong case to show that, so recently as the year 1780, when

<sup>(p)</sup> 1 Vern. 234.<sup>(q)</sup> 2 P. W. 421.<sup>(r)</sup> Ca. Tem. Talb. 228.<sup>(s)</sup> Willes, 211; and 7 T. R. 103, note.<sup>(t)</sup> 3 Atk. 282.<sup>(u)</sup> 1 Wilson, 185.<sup>(x)</sup> 2 Vez. 521.<sup>(y)</sup> 2 Burr. 873.See *Harris v. Barnes*, 4 Burr. 2157.<sup>(z)</sup> 1 Eden, 404. See particularly 418.<sup>(a)</sup> *Doe v. Fonnereau*, 2 Doug. 470.

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this case was before the court of king's bench, after it had been argued three times, that court deciding in the case before them that the limitation over was not too remote, referred to the case of *Stephens v. Stephens*, as being the case that went the greatest length that the courts had ever allowed. It plainly appears that the ground on which the court decided in favor of the limitation over in this case was, that the power of alienation would not be suspended beyond that period to which it might be suspended in the case of a contingent remainder in tail. Then there is the case of *Long v. Blackall*,<sup>(b)</sup> in which Lord Kenyon, C. J. expressly refers to the ground on which the suspension was allowed, as being analogous to the limitations of a common law conveyance. Then two years afterwards came the case of *Thellusson v. Woodford*,<sup>(c)</sup> which is an extremely important one, because all the law on the subject was fully discussed; and, in that case, for the first time, was the precise question mooted. In the first argument before Lord Loughborough, in the court of chancery, Buller, J. had stated that an executory \*devise of an estate [\*244] might be suspended vesting for a life or lives in being and twenty-one years after: and then Lord Alvanley, M. R. in giving his judgment says: "As to the period of twenty-one years, that could not be his meaning, nor, with submission to the learned judge who immediately preceded me, has it ever been considered as a term that may, at all events, be added to such executory devise or trust. I have only found this *dictum*, that estates may be unalienable for lives in being and twenty-one years, merely because a life may be an infant, or *en ventre sa mere*. Therefore I am clearly of opinion that expression cannot be held to mean more than children in the womb at the testator's death." This, therefore, if it had been the point in question, would have been a precise decision on the subject. It cannot of course be quoted as going that length: but it is a statement by Lord Alvanley evidently made on some consideration and reflection: and, as we find that Mr. Justice Buller did not express dissent, we may presume that he acquiesced in it. The case then came on before the house of lords.<sup>(d)</sup> There Macdonald, C. B. who delivered the opinion of the judges, says, "The established length of time during which the vesting may be suspended, is during a life or lives in being, the period of gestation, and the infancy of such posthumous child." It is evident that the judges did not mean to say that, in every case, twenty-one years might be taken. If a judge were asked what was the utmost limit, he never would say any thing about infancy or minority if he meant a term of twenty-one years, whether there were infancy or no infancy. It is impossible to suppose it should \*have been stated as a qualified term [\*245] of twenty-one years, if an absolute term was meant. Now, having thus detailed the progress of the judicial opinions on this subject, it can only be remarked, in answer to the statement that the opinions of conveyancers and learned persons have been otherwise, and that it has been univers-

(b) 7 T. R. 102.

(c) 4 Ves. 227.

(d) 11 Ves. 112; see 143.

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ally stated, in the text-books, that the period is lives in being and twenty-one years afterwards, that the rule has been stated in too unqualified a manner. But the law is not to be made to square with the deductions and reasons of the text-writers, but the reasons of the text-writers made to conform to the law. The invariable criterion, according to the authority of Lord Nottingham, of the validity or invalidity of executory limitations in point of remoteness, is this; could a corresponding limitation have been made by a legal limitation by way of remainder? Now, in answer to that, two cases have been cited, one of which was *Lloyd v. Carew*, and in which there certainly was a suspension for a year after the death of the testator. But there was no suspension of the power of alienation; for, the moment the life determined, the estate might have been alienated if the two parties concurred. The other case was *Heath v. Heath*. It has been said that there nothing was given to the son. It was given in fee to the father, and was given over, solely, in the event of the father not having a son who should attain twenty-one years. But alienation might have been suspended, by a legal limitation, just to the same extent. Suppose the estate had been given to the father, for life, with remainder to the son, in tail, with remainder to the father, in fee, or with remainder to the devisee over, in fee, it would have rendered the property alienable at the death of a [\*246] party in being and \*coming of age, that is, it would have rendered it alienable immediately upon the death of the father, except that the policy of the law will not allow an infant to alienate; and that is a want of alienation that no system of law ever could guard against, because it interferes with what the law considers more important, namely, the protection of parties when they have no power to protect themselves.

9th March.—Mr. *Hart*, and Mr. *Pepys*, for Henry Bengough, and Mr. *Cooper*, for Henry, Richard and Ann Ricketts, declined to argue the case.

Mr. *Preston*, in reply:—Although it has been asserted on the other side, by all the counsel, that a limitation over, to be valid within the rule against perpetuities, must be limited to take effect before the expiration of twenty-one years, as a positive term, after the death of a life or lives in being; yet they have all differed among themselves as to the terms in which the rule should be stated. If, however, they can be considered as having agreed that the rule is, that the most remote period is lives in being and the superadded period of infancy, then it is clear that *Lloyd v. Carew*, (e) *Gore v. Gore*, (f) and *Marks v. Marks*, (g) are authorities against it; and these cases all decide that limitations are valid which are made to take effect after lives in being and a subsequent term not exceeding twenty-one years, without any reference to infancy. In *Thellusson v. Woodford* the objection was, that the testator had infringed the law by taking lives as the measure of time, without reference to the enjoyment, and the objection did not prevail.

[\*247] \*It is objected that, even if the limitations in this will could be

(e) Show. P. C. 137.

(f) 2 P. W. 28.

(g) 10 Mod. 430.

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good, they are an evasion of the law and a fraud on the rule. That is a solecism. It is absurd to say that there is a rule of law which permits the suspension of property during a given period, and that it is an evasion of the law to conform to the rule. Nothing which is consistent with the rule can be a fraud on the rule.

The view taken of the 39th and 40th Geo. III. c. 98, by the counsel on the other side, is mistaken. It is impossible to say that there are not inaccuracies in the statute. Lord Eldon has said that it is in some respects inaccurately worded. Still, the statute is a legislative declaration of the validity of a trust for accumulation for a term of twenty-one years, independently of enjoyment. The statute law has, by construction only, declared that lives cannot be taken as the measure of time for accumulation. Even in the case of a deed the period of twenty-one years may be taken to commence from the death of the grantor. It is true that direct accumulation is prevented, except for the periods mentioned in the statute. But there are many indirect modes, as by planting, the management of underwood, &c. &c., in which an accumulation, as extensive in amount, may be made and kept within the period which the law permits, as could have been by the more direct modes of limitation which the statute virtually prohibits; in short, for the periods allowed by the rule against perpetuities as it stood prior to the statute, and as it protected the gifts in Mr. Thellusson's will.

It has been asserted to be impossible to make a series of legal limitations, without vesting the legal estate in \*trustees, of such a nature [\*248] as are made in this will through the interposition of those trustees in whom the legal inheritance is vested. But it is a mistake to suppose that valid limitations of the legal estate could not be made to take effect at periods as remote as the equitable interests given by this will are limited. It is true that, by will, interests may be limited in a mode or form that would not be valid in a deed. Thus in *Lampet's case*,<sup>(h)</sup> the bequest of a term of years to A. for life, and after his death to B. for life, was held good as an executory bequest, although the gift over, being of a chattel interest, would not have been valid by deed. By the rules of the common law the first taker would have had the whole term vested in him absolutely. If one is possessed of a term of one thousand years, he may, even by deed and by the rules of the common law, limit it to A. for ninety-nine years if he shall so long live, and, after that term, to B. for ninety-nine years if he shall so long live. And so any successive number of lives *in esse* may be taken. It is true that successive life estates, as mere life estates, limited of terms of years, are not good at common law. But a limitation to A. for one hundred years, if A., B. and C., or any of their issue, shall so long live, is a good limitation of the term: and the leases made by the Liverpool corporation are for lives, or lives and twenty-one years beyond the lives.

(h) 10 Co. 46.

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Although the case of *Jee v. Audley* has been quoted on the other side, yet it is important to observe that Lord Kenyon in that case stated the rule in these words: "Limitations of personal estate are void, [\*249] unless they \*necessarily vest, if at all, within a life or lives in being and twenty-one years, or nine or ten months afterwards." And there cannot be any doubt, notwithstanding the certificate in *Board v. Westcott*, that Lord Kenyon stated the rule with accuracy. In any other view than as formerly suggested, it is impossible to reconcile the case of *Beard v. Wescott* with *Heath v. Heath*. The limitation in *Beard v. Wescott* was such that neither of the periods exceeded twenty-one years from the death of the person *in esse*, and they were taken with reference to minority. But then it is said the minority to which the periods refer must be the minority of the person to take under the limitation. That is a mistake. The period may be taken with reference to the minority of a person on whose death the preceding estate is to determine. Therefore in *Heath v. Heath*, where the suspension was with reference, not to the donee, but to the son of the preceding donee, the limitation was held to be good, although that son was not to take any benefit under the limitations of the will. When the rule is stated to be that the minority referred to must be that of a party to take under the limitation, it breaks down under the authority of *Heath v. Heath*. There only remains the single *dictum* of Lord Alvanley on which the other side rely. But even that judge (whose authority is very great,) did in *Routledge v. Dorril*(i) hold that there might be a power of appointment to more remote issue as well as to children, and that no gift to issue could be too remote, provided the issue were *in esse* at the time of the appointment; if not *in esse*, the appointment, to be good, must, by express terms, be brought within the rule [\*250] as to perpetuities, and \*confined to take effect within a period not exceeding twenty-one years after a life or lives in being at the creation of the power. If the gift were limited to take effect within twenty or even twenty-one years after the life in being, the gift would clearly be good. *Jee v. Audley* was decided without impeaching that principle. If the trust had been restrained to issue *in esse* at the death, Lord Kenyon declared it would have been good. It was not so restrained, therefore it was decided to be bad.

*Leake v. Robinson* (k) was another case of the same kind; because the gift was to a class of persons to vest at the age of twenty-four, and they might all have been persons not *in esse*, at the death of the first taker. The gift was bad because too remote. That decision is consistent with all the cases which establish that a gift to take effect after life estates, must be limited so as not to be in suspense or contingency for a period to exceed the term of twenty-one years beyond lives in being. If by any possibility it may happen that the vesting may be suspended beyond the period of lives in being and twenty-one

(i) 2 Ves. jun. 357.

(k) 2 Mer. 363.

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years beyond the death of the survivor, the gift is too remote and void. That is the rule; and every limitation which must necessarily take effect or fail within that period is superior to all objection.

The case of *Somerville v. Lethbridge*, which has been relied upon by the other side, is quite consistent with the rule thus stated; for it must be admitted that where after life estates are given to three successive generations, of whom one only is *in esse* at the time of the gift, a limitation over to the persons in the third degree \*must transgress the limits which the rule [\*251] as to perpetuities prescribes. An estate may be given, for life, to a person *in esse*, with remainder to his unborn child for life, in tail or in fee, and that remainder is good; but there cannot be superadded a valid limitation to the child of the unborn child without transgressing the rule, that the gift over must, to be valid, take effect within twenty-one years after a life or lives in being. It is obvious the unborn child may live long beyond the twenty-one years from the death of the person *in esse*, who is to be the first taker. This probability renders the gift to the child in the third degree too remote. But a limitation to A. for life, with remainder to his grandson, to be born within twenty-one years after his decease, notwithstanding the grandson is to be the child of an unborn child, is good. The mere circumstance of the grandchild, to whom the remainder is limited, being the child of an unborn child is no objection, where the gift is so limited that it must take or fail of effect within twenty-one years after the life in being.

The challenge which has been offered against the power to make limitations, such as those in the present will, effectual at law without vesting the legal estate in trustees, may be easily answered. Such a series of legal limitations may be made, with perfect validity, by recourse to the doctrine of springing uses. A settlement, containing the same series of limitations as in this will, may be made without even a recourse to trustees to support contingent remainders. The limitations might be to the following effect:

The estates might be conveyed to releasees in fee, to the use of George Bengough, for ninety-nine years, if \*he so long live and if the [\*252] lives of twenty-nine other persons, or any of them, and twenty years should so long continue, and, if there should be any person answering the description of heir of his body, then, on determination of the estate limited to George Bengough, to the use of such person for ninety-nine years, if he shall so long live and if, &c. and from and after the determination of that estate, during the lives named and the twenty years, then to the use of the person who, during the life of those persons and the twenty years, should next answer the description, &c. and so on through the whole series of limitations in the will. It may be asked in whom the freehold and inheritance is to be made to vest. It is to be limited to the use of the person who, after the decease of all the twenty-nine persons named and the end of the twenty years, shall answer the description of heir male, &c. as in the will.

These limitations, without the intervention of trustees in whom the legal



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estate might be vested, are all clearly valid limitations of legal estates, and they are precisely, in effect, the limitations in this will. That they are valid limitations by way of springing use, is clear from the authority of *Davies v. Speed*.<sup>(1)</sup>

It is argued that the *dicta* of the judges, whose opinions have been cited, must be taken with reference to the history of the law and the progressive decisions of the courts on questions of this kind; and it is said that, at first, the judges were afraid to give effect to a limitation over after one life; that [\*253] afterwards it was \*allowed after two successive life estates, and that in *Thellusson's* will the number was extended to nine. Lord Thurlow expressly said that any number of lives might be taken—even a thousand, provided they were all lives in being at the time of the gift. It is true, Lord Chief Justice Wilmut appears to have said, the term of twenty-one years must be with reference to infancy; and it is also true that Lord Alvanley, forgetting what he had done before, said that the further period beyond lives in being must be minority. But these *dicta* cannot prevail against the uniform statement of the rule by the text-writers and the most eminent judges. The *dictum* of Lord Eldon, to which allusion has been made, must be taken with due allowance for the well-known caution of that great judge, who was speaking at a time when he knew the case of *Thellusson v. Woodford* was depending before the house of lords. But, even then, Lord Eldon mentioned twenty-one years as a limit of time beyond lives in being. In all the text-writers, Fearn, Butler, Cruise, and the time is stated to be twenty-one years, without any mention of minority. No doubt the period of twenty-one years was taken with reference to convenience, and because it is the period during which minority lasts, and because, in the ordinary course of settlements, the power of alienation may not be complete and absolute till the determination of lives in being and twenty-one years. All that is necessary to render a gift valid within the rule against perpetuities is, that it be clearly ascertainable, within this period of lives and twenty-one years, who is the person to take; and it must be immaterial in what way the description is made, so as there cannot be any doubt who is the person [\*254] whom it designates, when the time arrives at which the gift is \*to take effect. Suppose a gift to be made to A. in fee, and a gift over to take effect in case any person, living or born on the day of his death, shall appear at St. Paul's within twenty-one years after the death of A., the gift over would be good; for the happening of the event would make the person certain; and it is laid down, in *Perkins*, that a remainder limited to a person who shall first come to St. Paul's, is good.

Though such limitations as are contained in this will may appear whimsical to strangers, they are often wise and provident arrangements with a view to the circumstances of particular families. If the late Duke of Bridgewater had not framed his will with similar provisions, he could not have secured to the

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public those great schemes which produced so much benefit to the country, as well as to the parties who took beneficial interests under his will. The plan of that nobleman was, in order that the magnificent canals he had planned might be completed, to keep together his property, to appoint managers for carrying on the works, and to give the parties, who were to take the first benefit under the will, no control beyond taking certain parts of the rents till the scheme was completed; well knowing that if he had left the whole control and management of the canals to the parties to whom the first benefit was given, his canals and their business would have been neglected, and his schemes frustrated: therefore, with the view of securing the conduct of his great works, under proper management, he directed the accumulation, and ordered that the manager of them should have so large a sum as 4,000*l.* a year, in order to secure a competent person. That plan was \*completely suc- [\*255] cessful, and the works projected by that nobleman have, through the means of the limitations of his will, been preserved and entirely carried into effect, and their values increased and are increasing. Nor has any suspicion ever been breathed as to the validity of those gifts, though the present will follows exactly that model. And it even happens that one of the trustees under the Duke of Bridgewater's will (the late Chief Baron Macdonald) was one of the judges who delivered his opinion in *Thellusson's case*, in the house of lords, with full knowledge of the limitations in the duke's will.

The counsel on the other side have been challenged to point out the particular part of this will to which they object; but they have declined to do so. They content themselves with general objections to the whole course of limitations. But, even in their view, the limitations must be good to some extent: and it is for them to point out which of them in the series is too remote. It would be impossible to object to the entire will, even if some of the limitations were too remote: *Tregonwell v. Sydenham* has decided that the *cy pres* doctrine must prevail. An attempt to get rid of the whole will, by treating it like a case of obscurity and uncertainty, must fail in this case; for the limitations are expressed without any ambiguity.

The objection that there must be a merger of some of the terms created by the will, is without foundation. The terms are merely part of the scheme. They are not terms limited in the ordinary manner and for the ordinary purposes. They are merely expressed as measures of time.

\*The only question is, whether the limitations in this will are within [\*256] the rules of law against perpetuities. Whether the gifts or the objects of them are of a beneficial kind or not, is of no consequence, provided they are legal. The policy of permitting such gifts cannot be questioned in this place. This court is not to make or alter the law, but to administer it. Perhaps, if many persons were to frame wills on this scheme, some prospective legislative provision might be necessary. But such cases are (as might be expected) very rare. There are only two wills of the kind known to exist. The validity

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of Lady Denison's will,<sup>(m)</sup> which directed accumulation to a considerable extent, has never been questioned.

The objection, taken on the ground of obscurity or uncertainty, refers to that part of the will which describes the persons who, in certain events, are to take. The difficulty in framing that part of the will, proceeded from the necessity of using the words "heir male" as words, not of limitation, but of description, so as to avoid the operation of the rule in *Shelley's case*. The person to be described was the person who should, at the time, be heir male. In the case of *Thellusson's will*, the same objection as to obscurity or uncertainty was taken; but the judges decided there was sufficient certainty. The present will was framed with *Thellusson's will* for a guide against those inaccuracies which suggested objections, and with the advantages of all the observations made in the repeated discussions of the case of *Thellusson v. Woodford*.

[\*257] \*The trustees of the will having under the trusts of the term of twenty-one years, laid out a considerable sum of money, arising from the surplus income of the testator's estate, in the purchase of other real estates, and the testator having declared, after directing that investment, that the estates to be purchased by his trustees should be conveyed to them upon the trusts "hereinafter" declared of his devised estates, the plaintiff, George Bengough, as the testator's heir-at-law, claimed the rents of the newly purchased estates, as being undisposed of during the term of twenty-one years. The trustees, on the other hand, contended that it was the testator's intention that the newly purchased estates should be subject, in all respects, to the same trusts as the devised estates, and that, therefore, the word "hereinafter" ought to be construed either "hereinbefore," or "herein."

7th November.—The following are the arguments used by Mr. *Heald* and Mr. *Piggott*, for the heir-at-law :—"A testator's intention cannot be collected except from the words he uses; and if in this case the word "hereinafter" were to be changed into "hereinbefore," or "herein," the sense of the passage would be entirely altered. Does it follow, because the testator has directed the rents of the estates of which he died seised to be laid out in the purchase of other estates, that he intended that the rents of the estates to be purchased should be laid out in the same manner? Supposing that the court could, from the context of the will, infer that such was his intention, it could not convert his intention into an actual devise.

It cannot be denied that the testator, after directing the rents, when [\*258] they amount to 500*l.*, to be laid out \*in the purchase of three per cent consols, has ordered that the dividends of those consols shall, during the term of twenty-one years accumulate in the same manner and for the same purposes as the rents and profits of the real estates to be purchased had been by him directed to accumulate. But he has said that those very

(m) Mentioned 4 Ves. 286, and 11 Ves. 115.

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estates shall be subject to the trusts and purposes "hereinafter declared;" which trusts and purposes have no reference whatever to accumulation. So that to say that the rents of the purchased estates are to accumulate, would be in direct contradiction to the language used by the testator. Admitting, however, that the clause which directs the dividends of the stock to be accumulated, does afford evidence of an intention that the rents in question are to be accumulated, is that sufficient to authorize the court to order that they shall be accumulated? Where is the authority for that? The case of *Shelley v. Bryer*(n) decided that, where a previous gift is plain, the court will not allow the effect of it to be controlled by subsequent words which are inconsistent. Where words are sometimes used, in speaking or writing, in a sense which they do not properly bear, the court will, if the general intention of the instrument require it, construe those words in that sense. But were a word, such as "hereinafter," admits of only one meaning, there is no instance of the court construing it in a sense diametrically opposite, and saying that it meant "hereinbefore." When the testator directs how the estates to be purchased with the residue of his personal estate shall be disposed of, he does it by reference to his devised estates: he does not allude to the estates to be purchased with the \*accumulated rents; and, throughout the will, he [\*359] makes a distinction between those estates and the estates of which he was seised. The residuary clause furnishes a strong argument against the construction contended for. When the testator gives his personal estate, and directs it to be laid out in the purchase of land, he uses words, with respect to the land so to be purchased, clearly referring to the term of twenty-one years; but he does not use the same words when speaking of lands to be purchased with the rents. In the one case he does not refer, in the least, to limitations; but, in the other, he speaks of restrictions, limitations and charges. Now what are these restrictions, limitations and charges? They are the restrictions, limitations and charges declared of or concerning, not all the said estates, not of the estates to be purchased, but of the estates devised to the trustees.

The testator has made no provision for his nephew George Bengough during the life-time of his widow, unless he intended him to have the immediate enjoyment of the estates in question. The widow might have lived during the whole period of twenty-one years: and it is very improbable that the testator intended his nephew should have no provision during that time. The words "so to be purchased." were perhaps used, by mistake, for "so by me devised."

Mr. *Preston* and Mr. *Wilbraham*, for the trustees, argued in substance, as follows:—Mr. *Preston*:—The point in dispute has been already conceded in argument: for it has been said that the intention is clear, but that there is an inconsistent clause, and also that there is another clause which is \*inconsistent with the former. Now, it is one of the clearest prin- [\*260]

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ciples of law that, when there are two clauses in a will, and one is inconsistent with the other, the latter shall prevail over the former. Courts are most anxious to give effect to the intention, whenever it can be discovered; and there is no doubt whatever, in this case, of the intention. The will, from the beginning to the end, shows that the testator's object was accumulation, and to suspend the enjoyment of the property as long as he could do it consistently with the rules of law. It has been admitted that that was the case with reference to the personal estate, which was the bulk of this testator's property. Whenever there is an inconsistency in a will, the court will endeavor to reconcile all the parts of it. There is no impropriety in striking out the word "hereinafter," if that expression is inconsistent with the whole plan of the will. It is allowed to be inconsistent, and to have been inserted, by mistake, for "hereinbefore," in that part of the will; and the other side are obliged to alter the language, in order to found their argument and to avoid the inconsistency. A gift to the first and other sons to be begotten is, in point of law, a gift to the first and other sons begotten or to be begotten. Again, a gift to the first and other sons hereafter to be begotten, has been held to include sons previously born. No one who looks at this will can doubt that what the testator meant to accumulate for twenty-one years, was the whole of his property. Is it not then absurd to contend that the testator meant the rents of his devised estates, which were small in amount, to accumulate, and that he did not mean so as to the estates to be bought with his immense personal estate? The testator has provided \*an annuity of 300*l.* for his nephew, to commence at the death of his widow, who was very old; would he have so done if, upon the first estate being purchased, his nephew was to have the income of it? The testator never could intend to give his nephew two species of income, at one and the same time, out of one and the same property: for it is impossible to deny that the annuity was to issue out of the entire fund, as constituted of the devised estates, the personal estate, and the estates to be purchased. The word "herein" would reconcile all inconsistencies: and there is no difficulty in the court saying, upon the context of the will, that that is the real sense and meaning of the word. 'Supposing, however, that it is not allowable for the court to alter the meaning of the word, yet as the testator, in a subsequent part of his will, has declared that the rents and profits of the estates so to be purchased as aforesaid were by him directed to accumulate, it may be fairly argued that the word "hereinafter" has reference to that direction, and that the testator has, in fact, said that the rents of the purchased estates are to be disposed of according to what is declared in the subsequent part of his will, one of such declarations being that the rents and profits of those estates are to accumulate. The intention is clear; and the parts of the will will be inconsistent with each other unless either "hereinafter" is construed "herein," or, if taken in its natural sense, is referred to the clause which directs the rents, of the estates to be purchased, to accu-

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mulate. If the testator has directed those rents to accumulate, the word "hereinafter" expresses his intention just as must as the word "herein."

A distinction has been made between the estates \*to be purchased [\*262] with the residuary personal estate, and those to be bought with the rents of the real estates. But, when the point is considered, it will be clear that, if the plaintiff is entitled to the rents of the latter estates, he is entitled to the rents of the former also. Now it is evident, from the trust for accumulation for twenty-one years, that the income of the accumulations was destined for the purchase of real estates; and it would be incumbent on the trustees to have the accumulations so invested. But the rents of the estates to be so purchased would be, by force of the trust during twenty-one years, to be accumulated. Now there would be an income again arising from the estates so purchased, which income must, necessarily, according to the argument for the heir, go precisely in the same manner as the income of the estates purchased with the produce of the rents accumulated from the real estates. This is arguing in a circle, and shows the inconsistency there would be in adopting the construction which the heir contends for.

*Mr. Wilbraham*.—The testator directs that the trustees shall never permit a larger sum than 500*l.*, arising from the rents and profits of his real estates, to remain, at any one time, in the hands of any banker, but that, as often as there shall be that sum in hand, the same shall be laid out in the purchase of three per cent consolidated bank annuities, in the names of the trustees, until a convenient purchase or convenient purchases can be found, or until a sufficient sum of money shall be accumulated to make a proper purchase or proper purchases; and he directs that the interest, dividends and income of such three per cent consolidated bank annuities shall, during the said \*term of twenty-one years, and no longer, accumulate in the same [\*263] manner, and for the same purposes as the rents and profits of the real estate so to be purchased as aforesaid were by him directed to accumulate. Now, if the construction of the will be that there is no direction for the accumulation of the rents of the estates to be purchased, there will be a manifest inconsistency in the clause in question: for, in the former part of it, the testator says that the rents, when they amount to 500*l.* shall be laid out in order to accumulate for the purchase of real estates, and, in the latter part, that the dividends and income of such three per cent. consolidated bank annuities shall accumulate in the same manner and for the same purposes as the rents and profits of the real estates, so to be purchased as aforesaid, were by him directed to accumulate. Now, under the construction contended for on the other side, there is no direction for accumulation.

5th December.—The Vice-Chancellor, at the conclusion of the argument, ordered that the cause should stand over, in order that the authorities relating to the question might be produced; and on this day the cause was again called on.

*Mr. Preston*.—It is evident, from the context of the will, that the word

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"hereinafter" has been written instead of "herein," or "hereinbefore." The object of the will, throughout, is accumulation for a given period, and the difficulty in the construction of the word "hereinafter" is as to the accumulation only subsequent to the testator's death, and not as to the state of the property at the time when the testator died. The question simply is, whether [\*264] there is a suspension of the \*enjoyment, or an omission to give a beneficial interest in the rents arising from property to be purchased after the testator's death. The court is to be satisfied whether the authorities are strong enough to enable it to rectify the slip, or to supply the word necessary to carry into effect all the accumulation which was clearly intended.

*Doe dem. James v. Hallet(o)* is a case very similar to the present. In that case, to carry into effect that which, from the context, appeared to be the clear intention of the testator, the court held that the words in the will, "to be begotten," and "hereafter to be born," were to be rejected, and that a second son who was born before the date of the will, was the object of the testator's bounty, and entitled as devisee, notwithstanding these expressions seemingly referable to a son already born. The language of Lord Ellenborough, C. J., in delivering judgment in that case, is particularly applicable to the present case. His lordship said: "it would be a matter of the deepest regret if, in consequence of the joint effect produced by the blunder of the testator and the neglect of his attorney, we were compelled to put a construction on this will which would defeat the testator's intention."

In *Tollett v. Tollett,(p)* a case decided on the intention, the words "whereby the estate shall come to George Tollett" were rejected, although they expressed the event on which a portion was to be raised; and, on a rehearing, the court decided that the portion should be raised, although George [\*265] Tollett, who was tenant for \*life, had died before the estate came to him. True it is that *Doe dem. Spencer v. Goodwin(q)* was a case in which, on the construction of a lease in which there was a covenant not to assign, and in a subsequent part of the lease there was a proviso for re-entry in case of breach of the covenants "hereinafter contained," and the only covenant inserted after those words was a covenant for quiet enjoyment, the court refused to reject the word "hereinafter," and held that the lessor could not enter for breach of the covenant not to assign. But cases of that kind are very different from the present case, since the court is not required to alter words on the ground of any want of knowledge of the intention. Where the intention is clear, the court has, in a series of cases, altered, rejected or transposed words. As in *Coryton v. Helyar,(r)* the court supplied the words "if he shall so long live." In *Doe dem. Leach v. Micklam,(s)* the words "and after her death," were supplied; the court relying on the authority of *Fonnereau v. Fonnereau,(t)* in which similar words were supplied in order to give effect to

(o) 1 M. &amp; S. 124.

(r) 2 Cox, 340.

(p) Amb. 177. 194.

(s) 6 East, 486.

(q) 4 M. &amp; S. 265.

(t) 3 Atk. 315.

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the evident intention. In *Spalding v. Spalding*,(u) the court, in construing a will, decided that the words "without issue" must be supplied in order to give effect to the devise over as an expectant remainder. So in *Strong v. Teatt*,(x) the court supplied words to confine the generality of a devise, in order to exclude certain estates, that effect might be given to an intention to be collected from the different parts of the will. The same principle was acted on in *Smith v. Shouldham*, a case not reported, and which was heard on appeal before \*the house of lords, 3d June, 1818. *Clayton v. Lowe*(y) is to [\*266] the same effect; and so also is *Luxford v. Cheeke*.(z) In *Shergold v. Boone*,(a) the court rejected, or rather construed the words "who shall be living at my decease," and admitted children born in the testator's life-time. And in *Wykham v. Wykham*, the Lord Chancellor said that words might be supplied in a will where necessary in order to give effect to the clear intention.

Mr. *Heald* and Mr. *Piggott*, for the plaintiffs :—In all the cases which have been cited it will be found that they were cases in which the court supplied or rejected the words, because the instrument would otherwise have been insensible, repugnant, or unintelligible. There is no such reason in this present case for altering the word.

Mr. *Sugden*, for the personal representative of Mrs. *Ricketts* :—The testator has not, on the face of the will, done enough to enable the court, from what is before it, to alter the word. The rule laid down in *Chapman v. Brown*(b) must regulate the court in cases of this nature, and the present case is not within the rule.

Mr. *Hart* and Mr. *Pepys* appeared for Henry Bengough, and some other parties in the same interest; and Mr. *Cooper*, for Henry, Richard, and Ann *Ricketts*, but they declined to address the court.

\*14th August.—Upon the first point the Vice-Chancellor gave judgment in a few words, upon the rising of the court for the long vacation, stating that, although the rule of law be framed by analogy to the case of a strict settlement, where the twenty-one years was allowed in respect of the infancy of the tenant in tail, yet he considered it to be fully settled that limitations by way of devise or springing use might be made to depend upon an absolute term of twenty-one years after lives in being.[1]

(u) Cro. Car. 185.

(x) 2 Burr. 912.

(y) 5 B. & A. 636.

(z) 3 Lev. 135; and reported also by Lord Raymond, under the name of *Brown v. Cutler*.

(a) 13 Ves. 370.

(b) 3 Burr. 1626.

[1] The revised statutes of New-York, (part 2, chapter 1, title 1, article first, 1 R. S. 718,) have made several important provisions respecting future and contingent estates, which as they materially affect the subject of trusts for the purpose of accumulation, it may not be improper to state in this place. "§ 13. Future estates are vested or contingent. They are vested when there is a person in being who would have an immediate right to the possession of the lands, upon the ceasing of the intermediate or precedent estate. They are contingent, whilst the person to whom, or the event upon which they are limited to take effect, remains uncertain. § 14. Every future estate shall be void in its creation which shall suspend the absolute power of alienation for a longer period



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1827; 16th January.—On the second question the VICE-CHANCELLOR delivered his judgment to the following effect:—The testator gives to his widow

than is prescribed in this article. Such power of alienation is suspended, when there are no persons in being, by whom an absolute fee in possession can be conveyed. § 15. The absolute power of alienation shall not be suspended by any limitation or condition whatever, for a longer period than during the continuance of not more than two lives in being at the creation of the estate, except in the single case mentioned in the next section. § 16. A contingent remainder in fee may be created on a prior remainder in fee, to take effect in the event that the persons to whom the first remainder is limited, shall die under the age of twenty-one years, or upon any other contingency, by which the estate of such persons may be determined before they attain their full age. § 17. Successive estates for life shall not be limited, unless to persons in being at the creation thereof; and where a remainder shall be limited on more than two successive estates for life, all the life estates subsequent to those of the two persons first entitled thereto, shall be void, and upon the death of those persons, the remainder shall take effect, in the same manner as if no other life estates had been created. § 18. No remainder shall be created upon an estate for the life of any other person than the grantee or devisee of such estate, unless such remainder be in fee; nor shall a remainder be created upon such an estate in a term for years, unless it be for the whole residue of such term. § 19. When a remainder shall be created upon any such life estate, and more than two persons shall be named, as the persons during whose lives the life estate shall continue, the remainder shall take effect upon the death of the two persons first named, in the same manner as if no other lives had been introduced. § 20. A contingent remainder shall not be created on a term of years, unless the nature of the contingency on which it is limited be such that the remainder must vest in interest, during the continuance of not more than two lives in being at the creation of such remainder, or upon the termination thereof. § 21. No estate for life shall be limited as a remainder on a term of years, except to a person in being, at the creation of such estate. § 23. All the provisions contained in this article, relative to future estates shall be construed to apply to limitations of chattels real, as well as of freehold estates, so that the absolute ownership of a term of years shall not be suspended for a longer period than the absolute power of alienation can be suspended in respect to a fee. § 24. Subject to the rules established in the preceding sections of this article, a freehold estate, as well as a chattel real may be created to commence at a future day; an estate for life may be created in a term of years, and a remainder limited thereon; a remainder of a freehold or chattel real, either contingent or vested, may be created expectant on the determination of a term of years; and a fee may be limited on a fee, upon a contingency, which, if it should occur, must happen within the period prescribed in this article. § 25. Two or more future estates may also be created, to take effect in the alternative, so that if the first in order shall fail to vest, the next in succession shall be substituted for it, and take effect accordingly." The same title of the revised statutes also contains an important provision as to the accumulation of rents and profits. "§ 37. An accumulation of rents and profits of real estate, for the benefit of one or more persons, may be directed by any will or deed, sufficient to pass real estate, as follows:—1. If such accumulation be directed to commence on the creation of the estate, out of which the rents and profits are to arise, it must be made for the benefit of one or more minors then in being, and terminate at the expiration of their minority; 2. If such accumulation be directed to commence at any time subsequent to the creation of the estate out of which the rents and profits are to arise, it shall commence within the time in this article permitted for the vesting of future estates, and during the minority of the persons for whose benefit it is directed, and shall terminate at the expiration of such minority. § 38. If in either of the cases mentioned in the last section, the direction for such accumulation shall be for a longer term than during the minority of the persons intended to be benefited thereby, it shall be void as respects the time beyond such minority. And all directions for the accumulation of the rents and profits of the real estate, except such as are herein allowed, shall be void." As a branch of the same subject it is proper to observe that uses and trusts are abolished except in certain cases, by the second article of the same title. (1 R. S. 721.) "§ 45. Uses and trusts, except as authorized and modified in this article are abolished; and every estate and interest in lands, shall be deemed a legal right, cognizable as such in the courts of law, except when otherwise provided in this chap-

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an annuity of 4,000*l.* charged upon his real and personal estate, and, after the death of his wife, he gives to his nephew, George Bengough, who was his heir at law, out of the rents and profits of his real estate, an annuity of 300*l.* for his personal support, without any power of alienation; and, to another nephew, Henry Bengough, an annuity of 200*l.* also out of the rents of his real estates, for his personal support; and, subject to these annuities, he devises his real estates, except a house in St. James's square in Bristol, to his trustees named in his will, and their heirs, upon trust, as to his house called Penn Park, to permit his wife to reside in it during her life; and, as to the rest of the real estate, to receive the rents and profits for a term of twenty-one years, and, from time to time, to lay out the moneys to arise therefrom in the purchase of freehold estates of inheritance, as often as there shall be a surplus in their hands amounting to the sum of 1,500*l.*; and he directs that such real estates so to be purchased shall, \*from time to time, be conveyed to the trustees, upon the same trusts, and for the same intents and purposes as are in his will thereafter limited concerning his real estates thereinbefore devised to his trustees; and he directs that his trustees shall not permit a larger sum than 500*l.* to remain in the hands of any banker, out of the rents and profits of his real estates; and that, as often as such rents received by them shall amount to 500*l.*, they shall be laid out in the purchase of three per cent consolidated annuities, and that the dividends of such stock shall, during the said term of twenty-one years, accumulate in the same manner, and for the same purpose as the rents and profits of his real estates, so to be purchased as afore-said, are by him directed to accumulate. He then proceeds to limit the estates devised by him, in a most laborious manner, for the purpose of rendering those estates unalienable as long as the rules of law will permit, making his nephew and heir at law, George Bengough, the first object of his bounty; and he afterwards gives legacies, to a very large amount, out of his personal estate, and then limits his residuary personal estate to the same trustees, upon trust, during twenty-one years, to invest the income and the accumulations of the income, in the purchase of stock, or upon mortgage, as an accumulating fund, and to lay out the principal of the residuary estate in the purchase of lands in fee-simple, to be conveyed to the trustees upon the same trusts as are in his will declared concerning the lands thereinbefore devised to them, or as near thereto as may be. [\*268]

ter. § 47. Every person who by virtue of any grant, assignment or devise now is, or hereafter shall be entitled to the actual possession of lands, and receipt of the rents and profits thereof, in law or in equity, shall be deemed to have a legal estate therein of the same quality and duration, and subject to the same conditions, as his beneficial interest. Thus we see all the complicated machinery of shifting and springing uses, terms to preserve contingent remainders &c. entirely swept away. See further *Vail v. Vail*, 4 Paige, 317. *Hannan v. Osborn*, id. 336. If the interest of an unborn child of a person in being does not vest when such unborn child attains twenty-one, the gift is too remote and void, and the limitations over are void also. *Palmer v. Holford*, 4 Russ. 403. As to accumulation, see *Eyre v. Marsden*, 2 Keen, 564. *Blease v. Burgh*, 2 Brav. 221.

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[\*269] The question now to be considered arises upon that \*part of the will of the testator in which he directs the real estates to be purchased with the surplus rents and profits during the term of twenty-one years, to be conveyed to the trustees upon the same trusts, and for the same intents and purposes as are in his will thereafter limited concerning his real estates thereinbefore devised to his trustees. The only trusts thereafter limited concerning his real estates thereinbefore devised, are the beneficial trusts expressed in the laborious limitations to which I have before referred; and, if this direction is literally followed, the effect would be to give to George Bengough, the heir at law of the testator, who is the first object of these limitations, an immediate life interest in the freehold estates to be purchased with the surplus rents and profits during the term of twenty-one years.

It is argued that, taking the whole will together, this effect would be manifestly contrary to the intention of the testator; and that the plain purpose of the testator was, that these rents and profits should be laid out to accumulate in the same manner as the rents and profits of the estates in the will before devised; and that there has been an accidental slip in the expression; and, if the words "thereinbefore limited," were substituted for the words "thereinafter limited," the whole will would be made consistent. It is not to be doubted that the substitution of the word "thereinbefore" for the word "thereinafter" would have the effect of inducing an accumulation of these rents and profits, in the place of giving them to the immediate enjoyment of the defendant, George Bengough; and, the inquiry is, whether, upon the whole will,

[\*270] the testator has expressed such purpose; for no court can \*give effect to such purpose unless it be gathered from the express words in the will

After directing these estates, to be purchased with rents and profits, to be conveyed to the trustees, in the manner and trusts stated, he proceeds to direct that, as often as such rents and profits received by his trustees shall amount to 500*l.*, they shall be laid out in the purchase of three per cent consolidated annuities; and that the dividends of such stock shall, during the term of twenty-one years, accumulate in the same manner, and for the same purpose as the rents and profits of the real estates, so to be purchased as aforesaid, are by him directed to accumulate. The only part of this will which contains any direction as to these rents and profits, is the passage in question; and here, therefore, is a plain declaration of the testator that he did, by that passage, mean to direct the accumulation of these rents and profits. And, consistently with that intention, he directs that the dividends of the stock which were to serve for investments until freehold estates could be purchased, should, in like manner accumulate. Now this expressed purpose of the testator can only have effect by the substitution of the word "hereinbefore" for "hereinafter;" and, to effect such purpose, the court is bound to make the substitution.

There are other parts of the will which, though alone not to be relied upon, afford strong inference that such must have been the intention of the testator,

1827.—Todd v. Aylwin.

viz. the general purpose of accumulation, which runs through the whole will, and the circumstance that he has given an annuity of 300*l.* to George Bengough for his life, \*and for his personal support and maintenance, [\*271] who was the first object of his limitations; which is altogether inconsistent with an intention that he should take an immediate interest, of considerable value, in the rents and profits in question.[1]

## TODD v. AYLWIN. (\*)

1827; 8th November and 19th December.—*Laches.*

The original bill being for an account, and an injunction to restrain an action; and the injunction being dissolved on the merits nearly ten years after the bill was filed, the plaintiff filed a supplemental bill for a discovery, and commission to examine witnesses in aid of his defence to an action substantially the same; motion for the commission refused, with costs, on the ground of delay.

THE original bill in this cause was filed in 1816 against the persons interested in the freight of a ship, which had been chartered by the plaintiff. The prayer was, that an account might be taken of how much was due in respect of the freight; that the amount of certain losses or injuries, alleged to have been sustained by the plaintiff, through the neglect or default of the owner or master of the vessel, might be ascertained and deducted from the amount of the freight; and for an injunction to restrain the defendants from proceeding in a suit in the admiralty court, and in an action at law against the plaintiff to recover the freight.

[1] Where the words of one part of a will are capable of a two-fold construction, that should be adopted which is most consistent with the intention of the testator, as ascertained by other provisions in the will: and when the intention of the testator is incorrectly expressed, the court will effectuate it by supplying the proper words. The strict grammatical sense is not always regarded; but the words of the will may be transposed, to make a limitation sensible or to carry into effect the general intent of the testator. *Covenhoven v. Schuler*, 2 Paige, 130. *Bradhurst v. Bradhurst*, 1 Paige, 313. *Rathbone v. Dyckman*, 3 Paige, 26. *Walker v. Parker*, 13 Peters, 166. *Reno's executors v. Davis*, 4 Hon. & Mun. 283. *Land v. Otley*, 4 Randolph, 213. *Calloway v. Langhorne*, id. 181. *Barry v. Headington*, 3 J. J. Marsh. (Kentucky,) 321. Where the intention of the testator is ascertained, a word manifestly omitted by mistake may be inserted, but no word may be added to defeat the apparent intention of the testator. *Deakins v. Hollis*, 7 Gill & Johns, 311. So the omission of a name was supplied. *Marsh v. Hague*, 1 Edw. 174. Where a recital in a will manifests an intention to make a present bequest, and the words of actual bequest are omitted by mistake, the words will be supplied, and the recital will amount to an implied bequest. *Marsh v. Hague*, 1 Edw. 182. So, to effectuate the intention of the testator, "or" may be construed "and," and *vice versa*. *Stubbs v. Sargon*, 2 Keen, 255. *Miles v. Dyer*, 5 Sim. 435. *O'Brien v. Heeney*, 2 Edw. 249. *Turner v. Whitted*, 2 Hawks, (North Carolina,) 613. *Britton v. Johnson*, 2 Hill, (South Carolina,) 430. So, "heirs has been construed "children." *Bradford v. Heyward*, 2 Desau. 18. "Her" construed "their." *Keith v. Perry*, id. 353.

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 1827.—*Todd v. Aylwin.*


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The plaintiff obtained the common injunction for want of an answer, and that injunction was afterwards, on the usual affidavit, extended to stay trial.

In Trinity term, 1825, exceptions taken by the plaintiff to the [\*272] answer of one of the defendants were allowed; on which the plaintiff amended his bill and added a prayer for a commission to examine witnesses in aid of his defence to the action at law.

On the 28th of June, 1825, one of the defendants in whose name the action was brought, died; and the defendant Aylwin having taken out administration to him, the plaintiff filed a bill of revivor against him, and obtained an order to revive.

On the 25th of January, 1826, the defendant Aylwin obtained an order nisi for dissolving the common injunction, and, on the 18th of February, following, the plaintiff having shown cause against dissolving the injunction, the court ordered it to be dissolved absolutely.

On the 14th of June, 1826, the plaintiff filed a supplemental bill against the defendant Aylwin alone, alleging that, by various events which had happened since the plaintiff had exhibited his original bill, the defendant Aylwin was the only person who had or claimed to have any interest in the freight in question, and that he had lately commenced a new action at law against the plaintiff, as administrator of the deceased defendant, in whose name Aylwin had brought the former action, as having a beneficial, though not a legal interest in the freight. The plaintiff prayed, by this supplemental bill, the same relief against the defendant Aylwin as the original bill had prayed against all the defendants thereto, and also for an injunction to restrain the defendant's action at law, and for a commission to examine witnesses abroad, and that the [\*273] plaintiff might have the benefit of evidence taken under the commission to support his defence at law.

To this supplemental bill the defendant demurred.

Mr. *Heald* and Mr. *O. Anderdon*, for the demurrer:—All that is stated as supplemental matter is immaterial, and does not in any degree alter the nature of the case. The only material facts stated are not supplemental matter. For the purpose of the injunction the bill of revivor was sufficient, without the present supplemental bill. *Turner v. Wright*. (a) In *Adams v. Dowding* (b) it was decided that where in a supplemental bill all that was stated as supplemental matter was immaterial, a demurrer would hold.

Mr. *Agar* and Mr. *Parker*, for the bill:—The action commenced by the defendant since the bill of revivor was a new action, and unless a supplemental bill had been filed, none of the evidence taken under the commission could have read in aid of the defence to that action. Besides the title stated by the original bill was only partial, and this supplemental bill, for the first time, shows that the whole title is in the defendant.

(a) 1 Jac. & Walk. 290.

(b) 2 Madd. 53.

1827.—*Amphlett v. Parke.*

Mr. *Heald*, in reply :—It would be exceedingly hard if the evidence under a commission could not be read in aid of the last action without a supplemental bill. Suppose a commission had actually issued under the first bill, and that, after it was returned, but before the evidence could be used, \*the [\*274] plaintiff at law died, so that there must be a new action by his representative, (there being no revivor at law,) would the representative not be entitled to use the evidence obtained under the commission?

The Vice-Chancellor overruled the demurrer.

On the 4th December, 1826, the defendant having put in his answer to the supplemental bill, obtained the order *nisi* to dissolve the injunction which had issued in that suit. The plaintiff then gave notice of a motion for a commission to examine witnesses abroad. That motion was heard at the same time as cause was shown by the plaintiff against dissolving the injunction.

Mr. *Agar* and Mr. *Parker*, for the plaintiff.

Mr. *Heald* and Mr. *O. Anderton*, for the defendant.

The Vice-Chancellor dissolved the injunction upon the merits, and refused the motion for a commission with costs, stating that the plaintiff having for ten years acted on this bill as a bill for equitable relief, could not be permitted, when driven from his alleged equity, to treat his bill as if a bill for discovery merely, and now to seek for that commission which, if sought at all, ought to have been applied for ten years ago, the present action being substantially the same as was pending when the original bill was filed.

## \*AMPHLETT v. PARKE.

[\*275]

1827; 21st March, and 25th April.—*Will.—Conversion.—Tenant for life of residue.*

Testatrix gave her real and personal estate to trustees to sell, and directed that the proceeds of her real estate should be taken as part of her personal estate, that out of the moneys to arise by such sale and out of all other her personal estate her legacies should be paid, and gave the residue to A. for life, with remainder over: Held, that the real estate was absolutely converted into personality, and that some of the legacies which had lapsed belonged to the residuary legatee, and not to the heir. The legacies not having been paid within the year after the testatrix's death, A. is not entitled to that year's income, but it forms part of the capital of the residue.

MARTHA CLAY, spinster by her will, dated the 19th of August 1790, and executed and attested so as to pass freehold estates, disposed of her property as follows :—"I give and devise all my freehold and copyhold estates in the county of Essex unto and to the use of Nicholas Martyn, Esq. and Rawson Parke, Esq. their heirs and assigns, upon trust to sell the same, either by public auction or private contract. And I will and direct that the moneys to arise from such sale be considered and taken to be part of my personal estates." (The testatrix, after directing that the receipts of her trustees should be sufficient discharges to the purchasers, proceeded as follows :) "and I do hereby will

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and direct that, out of the moneys to arise from such sale, and out of all other my personal estate, the several legacies hereinafter mentioned be paid and satisfied, (that is to say,) to Lydia Ward, wife of Francis Ward, Esq. 500*l.*; to Elizabeth Cook, widow, the like sum of 500*l.*; to Elizabeth Parke, wife of the said Rawson Parke, the sum of 1,000*l.*; to Lydia Amphlett, widow, 1,000*l.*" (The testatrix here gave legacies to several other persons, and then continued thus :) "And all the residue of my personal estate, and of the moneys [\*276] arising from the \*sale of my real estates, I give and bequeath to the before named Nicholas Martyn, his executors, administrators and assigns, upon trust to pay the interest thereof to the before named Elizabeth Parke, for her life, for her separate use: and, after her death, upon trust to pay and divide the capital to, between and amongst all and every the child and children of the said Elizabeth Parke, born and to be born, equally, share and share alike, the respective shares of the sons to be paid at twenty-one, and of the daughters at twenty-one or marriage, which shall first happen, with benefit of survivorship between them, in the event of the death of one or more of them before such age or time as aforesaid, not only as to their respective original shares, but likewise as to all such share or shares as shall accrue to them, respectively, by survivorship; and, if there shall be but one such child, then to such only child, at such age or time as aforesaid; but, in case there shall not be any child, who being a son shall live to attain the age of twenty-one, or being a daughter shall live to attain the age of twenty-one or marry, then upon trust to pay the interest thereof to the before-named Lydia Amphlett, for her life, for her separate use; and, after her death, upon trust for all and every her child and children, born and to be born, in such manner, and with such benefit of survivorship, as I have hereinbefore directed concerning the child and children of the said Elizabeth Parke; and, in case neither the said Elizabeth Parke, or the said Lydia Amphlett shall have any child who shall live to attain such age or time as aforesaid, then upon trust, as to one moiety, for the executors or administrators of the said Elizabeth Parke, and, as to the other [\*277] moiety, to the executors or administrators of the said Lydia \*Amphlett. And I appoint the said Nicholas Martyn and Rawson Parke executors."

The legacies much exceeded the personal estate in amount: and, some of the legatees having died in the testatrix's lifetime, the question was, whether the real estate was absolutely converted into personalty, so that the lapsed legacies fell into the residue, or whether the conversion was partial only, and therefore those legacies belonged to the heir.

Mr. *Sugden*, for the heir, relied upon *Cruse v. Barley*,<sup>(a)</sup> and referred to *Maugham v. Mason*,<sup>(b)</sup> and *Jones v. Mitchell*.<sup>(c)</sup>

Mr. *Horn* and Mr. *Boteler*, for the residuary legatee, said that the testatrix had expressly declared that the proceeds of the sale of her real estate should be personal estate: that the sale was directed, not for a particular purpose, but

(a) 3 P. W. 20.

(b) 1 V. &amp; B. 410.

(c) 1 Sim. &amp; Sta. 290.

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for all purposes : that both estates were blended together : that the testatrix, after speaking of the moneys to arise from the sale of her real estates, used the words, "all other my personal estate : " and they cited *Mallabar v. Mallabar*,<sup>(d)</sup> and *Durour v. Motteux*,<sup>(e)</sup> which they said were not so strong in favor of the residuary legatee as the present case : and that in *Durour v. Motteux* there was no direction that the proceeds of the real estate should be considered as personalty : and that in *Jones v. Mitchell* the two estates were not blended together.

\*Another question arose in this cause under the following circumstances. [\*278]

The testatrix died on the 14th of July, 1803. The legacies were not paid within the year after the testatrix's decease. In 1819 Mrs. Parke died without issue. The master, in taking the accounts of the receipts and payments of the trustees and executors, had allowed the defendant, Rawson Parke, a year and a half's rent of the real estates from Lady-day, 1803, to Michaelmas, 1804, and a year and a half's dividends of two sums of stock, due respectively on the 10th of October, 1804, and 5th of January, 1805, which he had retained for the use of his wife, as tenant for life under the will.

Mr. *Horne*, and Mr. *Boteler*, for the plaintiffs, J. B. Hollingworth, and Lydia his wife, late Lydia Amphlett, the present tenant for life, said that, after the decisions in *Angerstein v. Martin*,<sup>(f)</sup> and *Hewitt v. Morris*,<sup>(g)</sup> it could not be contended that Mrs. Parke was not entitled to the first year's income of what ultimately proved to be the residue of the testatrix's property ; but that she could not be entitled to more, either upon principle or the expressions of the will ; for that the trustees were directed to pay her the interest only of the residue.

Mr. *Hart*, and Mr. *Garratt*, for the defendant Parke.

The VICE-CHANCELLOR :—The testatrix, Martha Clay, after devising her freehold and copyhold estates to trustees for sale, uses the \*following expression : "I will and direct that the moneys to arise [\*279] from such sale be considered and taken as part of my personal estate : " and, in a subsequent part of the will, she uses the following words : "And I do hereby will and direct that, out of the moneys to arise by such sale, and out of all other my personal estate, the several legacies hereinafter mentioned be paid and satisfied." And the residuary clause in her will begins in the following manner : "and all the residue of my personal estate, and of the moneys arising from the sale of my real estates, I give and bequeath," &c. &c.

Upon the particular language of the will in the passages to which I have referred, there arises this question : Whether the testatrix is to be considered as having intended that the moneys arising from the sale of the real estates,

(d) Ca. Temp. Talb. 78.

(e) 1 Vez. 320.

(f) 1 Turn. & Russ. 232.

(g) Ibid. 241.



1827.—*Monck v. Huskisson.*

should have the same qualities as if, at her death, they had been part of her personal estate : or whether she intended that those moneys, for the purposes of her will only, should form a common fund with her personal estate ?

The two first passages do, indeed, purport an intention that those moneys should be considered as if personal estate at her death ; but the latter passage points the other way ; and, it is only from deference to the two cases of *Duour v. Motteux*, and *Mallabar v. Mallabar*, that I arrive at the conclusion in this case that this testatrix had in her view the improbable intention that the moneys arising from the sale of her real estate should, for purposes not foreseen by her, have the same qualities as if, at her death, they had been part of her personal estate.

[\*280] \*There is another question arising from the circumstance that the pecuniary legacies were not paid until the end of a year after the testatrix's death ; and that the funds, with which those legacies were paid, did, in the mean time, produce interest or dividend.

The residuary estate is given for life, with remainders over to the children of the tenant for life ; and the tenant for life claims this interest or dividend as belonging solely to her. The testatrix, clearly, had not this intention. Her plain meaning was, that the tenant for life should enjoy the income of that property, the capital of which was to descend to her children ; and nothing more : and the interest or dividend in question is, therefore, to be considered as capital, of which the tenant for life will take the income only.(1)

### MONCK v. HUSKISSON.

1827 ; 17th and 20th March, and 27th April.—*Tithes.*

An exemption from tithes was claimed, as to certain copyholds, on the grounds of unity of possession of the rectory, manor and lands in one of the greater monasteries dissolved by 31st H. 8. Other copyholds of the manor had belonged to the monastery at the dissolution, and were subject to tithe. Held, nevertheless, that the exemption was good, because the monastery might have granted out the latter copyholds before the union of the rectory, and the former after it.

THE plaintiff agreed to sell to the defendants certain freehold and copyhold lands, situate within the parish and manor of Barking, in Essex. The freeholds and part of the copyholds were alleged, in the agreement, to be exempt from the tithes of corn and hay. The ground of the exemption was [\*281] the unity of \*possession of the manor, rectory and lands in the abbess and convent of Barking, which was one of the greater monasteries, and was dissolved by 31st H. 8, c. 13. However, in the account, contained in

(1) Reversed by Lord Brougham, 2 Russ. & M. 221. There was an appeal to the house of lords, but it was compromised before the cause came to a hearing. Ibid. S. C. 4 Russ. 75. See also *Williamson v. Williamson*, 6 Paige, 298. *La Terriere v. Bulmer*, 2 Sim. 18, 23, note. *Phillips v. Phillips*, 1 Myl. & K. 649. *Gooders v. Lloyd*, 3 Sim. 538. *Birdsall v. Hewlett*, 1 Paige, 34.

1827.—*Monek v. Hoekisson.*

Domesday, of the possessions of the abbey, the rectory was not mentioned. But in the graft of it, made by Edward 6th, it was expressed to have been parcel of the possessions of the monastery : and the lands, alleged to be exempt, were proved not to have paid tithes within living memory.

Upon the hearing of an exception taken by the defendants to the master's report which was in favor of the exemption, the *Attorney General*, Mr. Roupell, and Mr. Pemberton, for the defendants, said that the rectory, not being mentioned in Domesday, it was to be presumed that it did not belong to the monastery ; that, if the exemption really existed, the reason alleged for it could not be the true one ; because the exemption extended to the tithes of corn and hay only, and not to all tithes ; because part of the lands, said to be exempt, were copyhold, which they could not have been if they had belonged to the abess and convent, who were seised of the manor ; and because part of the copyholds, though alleged to have belonged to the monastery, were admitted to be subject to tithes.

Mr. Sugden and Mr. Preston for the plaintiff, said that, as it appeared, by the grant, that the rectory belonged to the abbey at the dissolution, the omission in Domesday must have been a mistake ; but that unity \*of [\*282] possession was not necessary to support the exemption, because a spiritual person might describe in *non decimundo*. *Nash v. Molins* : (a) that the circumstance of the exemption being partial, might be accounted for by the vicarage being endowed with all the tithes, except those of corn and hay : and that, as to part of the copyholds being subject to tithes, the abess and convent might take tithes from some of their copyholders, but not from others : and they cited the *Archbishop of Canterbury's case*, (b) and *Crouch v. Frier*. (c)

The VICE-CHANCELLOR :—This is a bill, filed by the vendors, for a specific performance of a contract for the sale of lands. Upon a reference to the master, he has found a good title in the vendors. The contract of sale states that certain freehold lands in Barking, and thirteen acres of copyhold lands, held of the manor of Barking, included in the sale, are free from the tithe of corn and hay : and, amongst other exceptions taken to the master's finding, is one as to this question of tithe.

The discharge from tithe is claimed upon the ground of the union of the freehold lands, and of the manor of Barking, and of the rectory of Barking, in the hands of the abess of Barking, beyond time of memory, and up to the dissolution. With respect to the freehold lands, there is no difficulty, it being clear that the union of the rectory with the title to the freehold lands, before time of memory, will, where the abbey, as in \*this case, was dissolved [\*283] by the 31st Hen. 8, continue the discharge of tithes to the grantee of the crown. But, inasmuch as the contract includes other copyhold land, held of the manor of Barking, which is admitted not to be tithe-free, a difficulty oc-

(a) Cro. Eliz. 206.

(b) 2 Rep. 48.

(c) Cro. Eliz. 784, S. C. ; Yelv. 2 ; Moor, 618 ; and Gwill. 218.

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 1827.—*Monck v. Huskisson*.
 

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curred to me how it could be made out, in point of law, that, upon the head of union, some copyholds could be tithe-free, and others subject to tithe.

If the copyholds in the manor existed before the union, they then paid tithe to the rector, and would continue to pay tithe to the abbeſs, after the union. If the copyholds were created pending the union, then they might not pay tithe, and would now be exempt. The counsel for the plaintiff ſay that it is to be conſidered that the copyholds which do not pay tithe, were the demesne lands of the abbeſs, and in her occupation, and, for that reaſon, might not pay tithe, although all the other copyholds did pay tithes. But upon that hypotheſis, *prima facie*, this difficulty ariſes, that, if theſe lands not titheable were the demesne lands of the abbey and in the occupation of the abbeſs, then, inas-much as no copyhold could be legally created within time of memory, and as the diſſolution of the abbey was within time of memory, theſe lands could not now be legal copyholds. Feeling this difficulty, I deſired this point to ſtand for a ſecond argument, in order that the counsel for the plaintiff might have the opportunity to look for authorities upon the ſubject.

The firſt caſe cited in the ſecond argument was the caſe of the Archbiſhop of Canterbury. A religious houſe, in Maidſtone, had divers lands there, and were alſo appropriators of the rectory. After the diſſolution, the [\*284] crown granted the lands to one, and the rectory, to another; the queſtion was whether theſe lands were diſcharged of tithes. The court held the lands were not diſcharged, becauſe the diſſolution of the religious houſe was not affected by 31ſt Hen. 8. But the court declared that, if the diſſolution had taken place under the 31ſt Hen. 8, and there had been an union of the lands and the rectory in the religious houſe beyond the time of memory, the lands would have continued exempt from tithes after the diſſolution. This caſe, therefore, only eſtabliſhes the acknowledged principle that, where before time of memory there was an union of the title to receive the tithe and of the title to pay the tithe, and the religious houſe was diſſolved by 31ſt Hen. 8, the exemption from tithes will continue. It is upon this principle, in the preſent caſe, that the defendants do not diſpute the exemption from tithes as to the freehold lands; but this caſe does not touch the difficulty as to the copyholds.

The other caſe relied upon by the plaintiff is that of *Crouch v. Frier*. In prohibition the ſurmiſe was that the Biſhop of Wincheſter was ſeiſed in fee of the manor of Biſhop's Waltham, and that he and his predeceſſors, before time of memory, and all his farmers and copyholders had been diſcharged of tithes. This preſcription was held to be good, becauſe it ſhall be intended that the preſcription had its commencement when all the manor was in the lord's hands; and the lord, being a ſpiritual perſon, was capable of tithes, and his farmers and copyholders ſtand in his place. This caſe has nothing to do with the principle of unity; for the biſhop was not rector. He claimed againſt the rector; and the only principal eſtabliſhed by this caſe, is

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that a copyholder, holding \*under a spiritual lord of a manor, may [\*285] prescribe for a discharge from tithes in right of the lord.

There being, therefore, no authority which is expressly in point, the case remains to be considered upon principle alone: and it has occurred to me that there might be a way in which it is possible that there may have been a legal origin to the exemption claimed for the partiular copyhold, although the other copyholds pay tithes.

The union between the manor and the rectory, to be good, must have taken place before time of memory; but yet, before the union, the abbess might have granted out all the copyholds, except what she then retained as demesne lands; and the copyholders, thus created, would of course, pay tithes to the rector before the union. But the demesne lands might not then pay tithes to the rector, because the abbess, being a spiritual person, was herself capable of tithes. After the union, the abbess might still, before time of memory, have alienated these thirteen acres, then part of her demesne, by copy of court roll, free from tithe, as she held them; and, in such case, these thirteen acres would, at this day, continue legally discharged of tithe, although the other copyholds paid tithes. There being this mode by which the exemption claimed might have had a legal origin, I think myself bound to affirm the title as to these tithes.[1]

\**MONCK V. MAWDSLEY.*

[\*286]

1827; 30th of April.—*Will.—Power.—Construction.*

A *feme coverte* having power to dispose by will of personal property and of a real estate at N., by her will, after reciting the power, gave several pecuniary legacies, and then gave to her husband her fields and house at N., likewise the remainder of her personalty, and all she might die possessed of after payment of her debts, legacies, and funeral and testamentary expenses; held that the husband took a life estate only in the realty, notwithstanding the gift to him of all the testatrix might die possessed of.

ARABELLA HUGHES, widow, by the settlement on her marriage with the defendant Peter Mawdsley, conveyed a messuage and other hereditaments, in Great Neston, to Archibald Keightley, his heirs and assigns, and assigned to him his heirs, executors, administrators and assigns, certain leasehold premises, and all her bonds and other securities for money, and all her household goods, plate, linen, china and furniture and other personal estate and effects in trust, after the marriage, as to the household goods, plate, linen, china and furniture, for the sole and separate use and disposal of Mrs. Hughes during her life, and, after her decease and in default of such disposal, in trust for her next of kin, as if she had died a *feme sole* and intestate: and, as to the messuages and premises in Great Neston, to the use of Archibald Keightley

[1] S. C. But on a different point 4 Russ. 121, note. Vide *Humphreys v. Wagstaff*, 1 Russ. & M. 529.

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and his heirs, during Mrs. Hughes' life; and, as to the messuages and premises in Little Neston, upon trust that Archibald Keightley, his executors and administrators, should pay the rents to Mrs. Hughes for her separate use; and, as to the messuages and premises in Great Neston, after the decease of Mrs. Hughes, to the use of such person and persons, and for such estate and estates, as Mrs. Hughes, by her will to be signed, sealed and published in the presence of two or more credible witnesses, should appoint, and, in default of such appointment, to the use of Archibald Keightley, his heirs and assigns, upon trust to sell, and to divide the proceeds equally amongst the children of Mrs. Hughes, at the usual periods, and, in default of children, to distribute the same amongst her next of kin.

[\*287] \*Mrs. Mawdsley made her will which was executed as required by the settlement, and was as follows:—"I, Arabella Mawdsley, wife of Peter Mawdsley, do make this my last will and testament in manner and form following, having full disposing power by settlement, made at my marriage with the above Peter Mawdsley, now in the hands of Mr. Archibald Keightley, sen., solicitor, Liverpool, and my trustee." (The testatrix here gave several pecuniary legacies, and then proceeded thus:—)"I give, devise and bequeath, to my husband Peter Mawdsley, my two fields and house in the township of Great Neston, likewise the remainder of my personalty, and all I may die possessed of at the time of my death, after the above bequests are fully discharged, my just debts paid, funeral expenses, and proving this my last will and testament.—I nominate and appoint Mr. Archibald Keightley, and my husband, Peter Mawdsley, trustees and executors of this my last will and testament."

Mrs. Mawdsley died on the 24th May 1824, leaving the plaintiffs, her sisters and only next of kin.

The bill alleged that Peter Mawdsley claimed to be entitled, in equity, to the fee-simple of the messuage, lands and premises devised to him by the will; whereas the plaintiffs submitted that he was only entitled to a life estate therein, and that they, as the next of kin of the testatrix, were entitled to have the house, land and premises sold, subject to the life estate of Peter Mawdsley therein, and to have the proceeds distributed between them, according [\*288] to the directions contained in the settlement. And it prayed that \*the defendant Archibald Keightley, might be decreed to sell the reversion of the messuage, land and premises, and to distribute the proceeds between the plaintiffs, according to the directions of settlement.

To this bill the defendant Peter Mawdsley put in a general demurrer.

Mr. Preston and Mr. Koe, in support of the demurrer, cited *Hopewell v. Ackland*, (a) *Smith v. Coffin*, (b) *Cooke v. Farrand*, (c) *Barnes v. Patch*, (d) *Doe v. Gilbert*, (e) *Hurstep v. Brooman*, (f) *Goodtitle v. Maddern*, (g) *Beachcroft*, (h) *Pitman v. Stevens*, (i) *Hogan v. Jackson*, (k) *Ridout v. Pain*. (l)

(a) 1 Salk. 239.

(b) 2 H. Black. 444.

(c) 7 Taunt. 129.

(d) 8 Ves. 604.

(e) 3 Brod. &amp; Bing. 85.

(f) 1 Bro. C. C. 437.

(g) 4 East, 496.

(h) 2 Vern. 690.

(i) 15 East, 505.

(k) Cowp. 299.

(l) 3 Atk. 486.

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Mr. Sugden and Mr. Spence, in support of the bill, cited *Doe v. Rout*,<sup>(m)</sup> *Timewell v. Perkins*,<sup>(n)</sup> and *Roe v. Yeud*.<sup>(o)</sup>

The VICE-CHANCELLOR :—The testatrix in this case was a *feme covert*, who, by settlement made previous to her marriage, had power to dispose, by will, of fee-simple estate, of leasehold estate, and of bonds and securities for money, and household goods and furniture, plate, linen, china and other personal estate. Her will, which was executed as required by the power, commenced in the words following :—“ I, A. Mawdsley, \*wife of Peter Mawdsley, do make this my last will and testament in manner and form following, having full disposing power by settlement made at my marriage with the above Peter Mawdsley, and now in the hands of Mr. Archibald Keightley, solicitor, Liverpool, and my trustee.” And, after giving several pecuniary legacies, continued thus :—“ I give, bequeath and devise, to my husband, my two fields and house in Great Neston,” (being the estate of which she had power to dispose, likewise the remainder of my personalty, and all I may die possessed of at the time of my death, after the above bequests are fully discharged, and my just debts, funeral expenses, and proving this my last will and testament.” And she appointed her said husband and another person her executors. The question in the cause was, whether the fee in the two fields and house in Great Neston, passed to the husband by force of the expression : “ and all I may die possessed of at the time of my death.”

Many cases have been cited on the subject, (and the question is one of great nicety,) in all which cases the words, in their ordinary signification, would include real estate.

It is first argued, against the husband, that, in the disposition made by the expression : “ All I may die possessed of at the time of my death,” there is no reference to the power under which the will is made, and that, if these words would give a fee, where a testator devises property of which he is the owner, they will not have that effect here. I do not concur in that argument. The introductory words in the will purport that the will is made only by force of the power, and \*every clause in the will is, therefore, to be [\*290] referred to the power.[1] The argument for the husband is, that these words will have no effect unless they operate to carry the fee of the Neston estate, the whole personal estate passing by the prior expression. But I know of no case in which words have been held to carry a fee simple, because they would, otherwise, be mere surplusage and repetition. In all the cases cited, either the words do, in their ordinary signification, include real estate : as in *Hopewell v. Acland*, “ Whatever else I have not disposed of :” In *Smith v. Coffin* : “ The rest and residue of my goods, chattels, rights, credits, personal and testamentary estates :” In *Huxstep v. Brooman* : “ All I am worth :” In *Beachcroft v. Beachcroft* : “ My wife to have one moiety after

(m) 7 Taunt. 79.

(n) 2 Atk. 102.

(o) 2 New Rep. 214.

[1] Vide *Napier v. Napier*, 1 Sim. 28, 37 n.

1827.—Monk v. Mawdsley.

my debts paid.[1] In all which cases the words, in their ordinary signification, would include real estate : or if the words used do not, in their ordinary signification, include real estate, the testator has shown that he meant to apply them to real estate : as in *Hogan v. Jackson*, where the expression is : "The residue of my effects, both real and personal, which I shall die possessed of." In their ordinary sense, the words "possessed of," would not import real estate ; but the testator there expressly applies them to real estate. In the present case, there is nothing to show that the testatrix meant to use the word "possessed" in any other than its ordinary sense ; and, on the contrary, the expression "at the time of my death," imports that she had personal estate alone in her contemplation ; for those words would have no sense as applied to real estate.

My conclusion is, according to the principle of the decision in *Doe* [\*291] *v. Rout*, that the words in question \*might have been sufficient to pass real estate, if, from other parts of the will, such had appeared to have been the intention of the testatrix : but that no such intention does sufficiently appear in any part of the will. The words are to be considered, therefore, as loose and general words, and mere surplusage, which do not add to the sense of the will.[2]

[1] A gift to A. and B. by will, "whom I appoint my executors of all that I possess in any way belonging to me, by them freely to be possessed or enjoyed, of whatever nature or manner it may be," will pass the fee simple of real estate. *Thomas v. Phelps*, 4 Russ. 348.

[2] S. C. Tamlyn, 24. The word "heirs" is not necessary to the carrying of a fee in a will ; any other terms or provisions, clearly indicating the intention of the testator, are sufficient. *Bradstreet v. Clarke*, 12 Wend. 602. *Johnson v. Johnson*, 1 Mun. 549. *Waring v. Middleton*, 3 Desau. 249. *Clark v. Mikell*, id. 168. *Whaley v. Jenkins*, id. 80. *Eagle v. Burns*, 5 Call, 463. There are certain words or forms of expression, which by a series of adjudications have become established as words of perpetuity, and equivalent in all respects to the word "heirs," in a deed—such are "estate," and "property" *Bradstreet v. Clarke*, ubi sup. *Fraser v. Hamilton*, 2 Desau. 578. *Bass v. Scott*, 2 Leigh, (Virginia,) 356. *Carr v. Porter*, 1 McCord, (South Carolina,) Ch. Rep. 60. *Foster v. Craig*, 2 Dev. & Batt. 211. A devise of one-half of the testator's plantation was held to carry a fee. *Dunlap v. Crawford*, 2 McCord's Ch. Rep. 177. The words "temporal goods" may be borrowed from the preamble of a will, and coupled with a devising clause, to enlarge a life estate into a fee simple. *Goodrich v. Harding*, 3 Rand. 280. A devise, with power to convey a fee, carries a fee ; but not a power to devise merely. *Doe v. Howland*, 8 Cow. 277. Questions of the above description can no longer arise in the state of New York, except as to wills made prior to the period when the revised statutes came into operation ; and an estate in fee passes by grant or devise without words of inheritance. "Unless the intent to pass a less estate or interest shall appear by express terms, or be necessarily implied in the terms of such grant." Part II, chapter i, title v, §1, 1 R. S. 739.

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1827.—Chillingworth v. Chillingworth.

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## CHILLINGWORTH v. CHILLINGWORTH.

1827 ; 25th April.—*Practice.*—*Vendor and purchaser.*The vendor may confirm an order *nisi* obtained by the purchaser, if the latter neglect to do so.

THE purchaser of an estate under a decree moved for and obtained the order *nisi*, and served it upon the vendor. The purchaser having afterwards neglected to confirm the order, the vendor now made that motion. It was objected that the vendor ought not to confirm the purchaser's order, but to obtain a new order *nisi*. The Vice-Chancellor was of a different opinion, and made the order prayed.[1]

[1] Vide *Vincent v. Going*, 1 Fl. & Kel. 217.

END OF PART II.



## CASES IN CHANCERY

BEFORE

### THE VICE-CHANCELLOR.

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[\*293]

\*MEMORANDUM.

ON the 30th of April, the Earl of Eldon resigned the great seal, which, on the same day, was delivered by his majesty to the right honorable Sir J. S. Copley, knight, who was created a peer of the united kingdom, by the title of Baron Lyndhurst of Lyndhurst, in the county of Southampton.

On the 3d of May, the right honorable Sir John Leach, Vice-Chancellor of England, was appointed master of the rolls, in the place of Sir J. S. Copley.

On the following day, Anthony Hart, esquire, one of his majesty's counsel, was appointed Vice-Chancellor in the place of Sir John Leach, and received the honor of knighthood, and was afterwards sworn in a member of his majesty's most honorable privy counsel.

Sir C. Wetherell, knight, his majesty's attorney general, resigned that office, and, on the 27th of April, was succeeded by James Scarlett, esquire, one of his majesty's counsel, who also received the honor of knighthood.

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[\*294]

\*STEAD v. CLAY.

1827; 5th May.—*Injunction.—Debtor and creditor.*

The wife of a bankrupt, having separate property, died in France, in possession of other property there, which was claimed by the creditors as belonging to the husband. She, by will, disposed of all her separate estate, except 1,500*l.* consols (which, in default of appointment, was held in trust for her executors or administrators,) and appointed a lady, resident in France, her executrix.

Injunction granted, at the suit of the assignees, to restrain the transfer of the consols; but refused as to the rest of the separate estate.

THE plaintiff was the assignee of one Liddard, a bankrupt, under a commission issued on the 26th of June, 1823. The defendant, Mrs. Clay (who was resident in France) was the executrix and residuary legatee of the bankrupt's late wife, who died in Paris in January, 1825, having considerable separate

1827.—*Stead v. Clay.*

property, the whole of which she disposed of, except 1,500*l.* three per cent. consols, standing in the names of the defendants, her trustees, and which, in default of appointment, was held in trust for Mrs. Liddard's executors or administrators : Liddard, therefore, upon his wife's decease, became entitled to it in his marital right.

In 1822, Liddard sold his household goods and furniture, invested the proceeds, together with other moneys, in the French funds, and shortly afterwards went, with his wife, to reside in Paris. After the issuing of the commission, he returned to this country, and died, after his wife.

The bill alleged that Liddard, before he went to reside in Paris, had committed an act of bankruptcy : that he absconded thither to avoid his creditors : that he remitted the proceeds of his furniture, and other moneys, to Paris, and procured them to be invested in the French funds, in his wife's name, in order to defraud his creditors : that Mrs. Clay, as the executrix of Mrs. Liddard, had possessed herself of that stock, and also of some furniture and other articles which the bankrupt had left in his late wife's possession on \*his [\*295] return to this country ; and that, as Mrs. Clay resided in France, the plaintiff would be unable to recover them from her. The bill prayed either that the stock in the French funds, and the other property of the bankrupt in France, might be delivered to the plaintiff, or that the value thereof might be paid to him out of the testatrix's estate : that that estate might be secured, and a receiver of it appointed : and that the defendants, the trustees, might be restrained from transferring any part of the testatrix's separate property.

The answers of Mrs. Clay and the trustees denied having any knowledge of Liddard's having committed an act of bankruptcy, or done any of the other acts complained of with a view to defraud his creditors. Mrs. Clay, however, admitted that the testatrix, shortly before her death, had transferred a sum of French stock into the names of her, Mrs. Clay, and another person, as trustees : and it did not appear how the testatrix had become possessed of this stock.

Mr. *Sugden*, Mr. *Rose*, and Mr. *Knight*, now moved for an injunction, according to the prayer of the bill.

Mr. *Shadwell*, and Mr. *Ching*, appeared for the defendants, and opposed the motion.

The Vice-Chancellor(a) granted the motion as to the 1,500*l.* consols ; but refused it as to the other sums of stock.(b)

(a) Sir Anthony Hart.

(b) The bill was afterwards amended : and, on the answer being put in to the amendments, it appeared that Mrs. Liddard had disposed, by her will, of the 1,500*l.* consols, as well as of the rest of her separate estate. The defendant, Mrs. Clay, then moved the Lord Chancellor to discharge the order made by the Vice-Chancellor ; and the plaintiffs made a cross-motion to have the injunction extended to the rest of Mrs. Liddard's separate property. On the 31st March, 1828, his lordship refused the former motion, and granted the latter. [See the report of these motions, 4 Russ. 550.]

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 1827.—*Davidson v. Napier.*


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[\*296]

\**MILLER v. WHEATLEY.*1827; 5th May.—*Practice.—Exceptions.*

Exceptions to an answer filed, after the bill has been amended, will not be taken off the file, if no answer is required to the amendments.

THE plaintiff having changed his name, by the king's license, the bill was amended after the answer had been put in, by substituting the plaintiff's new name for his old one, and by adding another defendant. The plaintiff then excepted to the answer.

Mr. *Skirrow*, for the defendant who had answered the bill, moved that the exceptions might be taken off the file for irregularity, they having been filed after the bill was amended.

Mr. *Whitmarsh*, for the plaintiff, cited *Taylor v. Wrench*,<sup>(a)</sup> and said that the amendments were of such a nature that no further answer could be required.

The Vice-Chancellor ordered the plaintiff to pay the costs of the motion, and that the exceptions should remain on the file.[1]

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\**DAVIDSON v. NAPIER.*1827; 7th May.—*Partnership.—Solicitor.*

One of two solicitors, who were partners, became bankrupt; the assignees excluded the other from interfering with the affairs of the partnership; the court nevertheless refused to order the assignees to deliver to him the papers belonging to the clients of the firm.

THE plaintiff and one *Dickens* were partners as solicitors and attorneys. *Dickens* became bankrupt, and his assignees having excluded the plaintiff from all interference in the affairs of the partnership, the bill was filed, praying to have the affairs of the partnership wound up, and for an injunction to restrain the defendants, the assignees, from intermeddling with the partnership property and effects.

Mr. *Spence*, for the plaintiff, now moved that the books, papers and writings of the partnership, belonging to the persons who had employed the plaintiff and *Dickens* as attorneys and solicitors, might be delivered to the plaintiff, upon oath.

The Vice-Chancellor refused the motion, saying that he had no right to order the papers of the clients to be delivered to one of the partners, without the consent of the clients.

(a) 9 Ves. 315.

[1] Vide *Taylor v. Bailey*, 3 Myl. & Cr. 677. So the prayer of the bill may be amended without affecting exceptions to the answer—as for an injunction. *Jacob v. Hall*, 12 Ves. 458.

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 1827.—*Astley v. Milles and others.*


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**\*MARY ANN ELIZABETH ASTLEY v. THE HONORABLE GEORGE JOHN [\*298]  
MILLES, and others.**

1827; 8th, 9th, and 10th May, and 29th October.—*Merger of charges.—Evidence.*

A tenant for life of an estate settled in strict settlement, buys up some of the charges on the estate and has them assigned to a trustee; he next purchases the ultimate remainder, and has it conveyed to him subject to the subsisting charges; he then devises the estate, subject to the charges that might be thereon at his decease; the intermediate remainders fail at his death. The charges so purchased are merged; and parol evidence is admissible to prove that the testator so intended.

RICHARD WARNER, esquire, by his will, dated the 10th of December, 1750, gave all his manors, messuages, lands, tenements and hereditaments in North Elmham, Bectley, Gressenhall, Bittering, East Bilney, Brisley, Sandfield, Horningtoft, Gateley and Ryburgh, in the county of Norfolk, to Lee Warner and Henry Lee Warner, for the term of ninety-nine years next after his death, upon trusts long since satisfied, and subject thereunto, to his eldest daughter, Mary Milles, widow of Christopher Milles, esquire, for her life, or until her eldest son should attain the age of twenty-four years, which should first happen; and, after the decease of Mary Milles, or her eldest son attaining the age of twenty-four years, he gave the same hereditaments and premises to Richard Milles, his grandson, eldest son of Mary his daughter, for his life; with remainder to trustees to preserve contingent remainders; with remainders to the first and other sons of Richard Milles successively in tail male; with remainder to Christopher Milles, his grandson, second son of his daughter, for his life; with remainder to the same trustees to preserve contingent remainders; with remainders to the first and other sons of Christopher Milles successively in tail male; with remainder to John Milles, his grandson, third and youngest son of his daughter, for his life; with remainders to his sons in like manner; with remainder to the heirs male of the body of Mary Milles; with remainder to his own right heirs. And, after \*reciting that he held, [\*299] by lease from the dean and chapter of Norwich, the rectory impropriate of North Elmham, and certain lands lying dispersedly amongst his real estates and lands in North Elmham, and, in like manner, held, by lease of the said dean and chapter of Norwich, certain lands in Gateley and Colkirk aforesaid, the testator gave the same rectory and lands to Mary Milles his daughter, her executors, administrators and assigns, in trust for the uses, estates and purposes thereinbefore by him declared touching his real estates in North Elmham, and Gateley, and Colkirk, and that the same might, from time to time, be enjoyed with the other estates in North Elmham and Gateley aforesaid, with which the same were so intermixed; and that the person or persons being in the legal possession of the North Elmham and Gateley estates should, from time to time, pay the yearly reserved rents, and renew leases, and pay and discharge all fines and payments incident to the same, the testator's will being that the rectory, lands and premises might always, unless hindered by

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 1827.—Astley v. Milles and others
 

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arbitrary impositions, be held and enjoyed according to the devises and limitations thereinbefore by him declared touching his real estates in North Elmham and Gately : and he appointed his two daughters, Mary Milles and Elizabeth Joddrell, his executrixes.

The testator died some time after, making his will, leaving his two daughters his co-heirs at law. Christopher Milles, the second son of Mary Milles, died many years since without issue.

By indentures of lease and release, dated the 13th and 14th of [\*300] December, 1773, the release made between \*Mary Milles and Richard Milles, her eldest son, of the first part ; Stafford Squire Baxter, of the second part ; John Colman, of the third part ; Sir Edward Astley, Bart. William Codrington, Esq. and Edward Milles, Esq. of the fourth part ; and John Wodehouse, who afterwards became Lord Wodehouse, and Lewis Cage, Esq. of the fifth part ; and by a common recovery suffered as of Hilary term, 14 Geo. 3, all the manors, advowsons and other hereditaments belonging to Mary Milles and Richard Milles, or either of them, in the county of Norfolk, then late of Richard Warner, deceased, or since his decease, purchased by Mary Milles and Richard Milles, or either of them, were settled on Richard Milles, for his life ; with remainder to trustees to preserve contingent remainders ; with remainders to the first and other sons of Richard Milles successively in tail male ; with remainder to John Milles, the younger and only other surviving son of Mary Milles, for his life ; with remainder to trustees to preserve contingent remainders ; with remainders to his first and other sons successively in tail male ; with remainder to Mary Milles, for her life ; with remainder to trustees to preserve contingent remainders ; with remainder to Lord Wodehouse and Lewis Cage, for 500 years, to be computed from the death of Mary Milles, upon the trusts therein declared, and, subject thereto, to any one or more of the daughters of Richard Milles, for such estate tail and estates tail, and in such shares and manner as Richard Milles should, by deed or will to be executed and attested as therein mentioned, appoint ; and, in default thereof, to the use of all the daughters of Richard Milles, equally to be divided between them, as tenants in common in tail, with cross-remainders amongst [\*301] them in tail, with divers remainders over, and \*with the ultimate remainder to the right heirs of Mary Milles. The trusts of the term of 500 years were, that the trustees should raise, by the usual means, after the death of Mary Milles, and after the deceases and failure of issue male of Richard Milles and John Milles, the sum of 25,000*l.*, and, in the mean time, the interest of that sum, at 4 per cent. per annum, to be computed from the death of Mary Milles, or from the decease of the survivor of Richard Milles or John Milles, or from the time of the failure of their issue male, which should last happen, and should pay the 25,000*l.* and the interest thereof, to such persons, in such parts, manner and form as Mary Milles should by deed or will appoint.

By a deed poll, dated the 24th of October 1775, Mary Milles, by virtue of

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the power given to her by the last indentures, directed the trustees of the term of 500 years to pay 10,000*l.*, part of the 25,000*l.*, to Mary Milles, the younger, the eldest daughter of the first-named Mary Milles, and 5,000*l.*, further part of the 25,000*l.*, to the personal representatives of John Milles; and 10,000*l.* the remainder of the 25,000*l.*, to Henry Lee Warner and the Rev. John Astley, upon trust to place out at interest 5,000*l.*, part of that 10,000*l.*, and to pay one moiety of the 5,000*l.* to Bernard Astley, one of the sons of Sir Edward Astley and Dame Ann Astley, his wife, the second and youngest daughter of the first-named Mary Milles, when Bernard Astley should attain the age of twenty-one years; and to pay the other moiety of the 5,000*l.* to Richard Astley, another of the sons of Sir Edward and Lady Astley, when he should attain the age of twenty-one years, with benefit of survivorship in case either of \*them should die before he attained his age of twenty-one years; and, [\*302] in case they should both die before they attained that age, then to pay the last-mentioned sum of 5,000*l.* to Edward John Astley, Henry Nicholas Astley, and William Coke Astley, three other sons of Sir Edward and Lady Astley, in equal shares, when they should respectively attain the age of twenty-one years, with benefit of survivorship in case any of them should die under that age; and also to place out at interest, in like manner, the sum of 5,000*l.*, the remaining part of the last-mentioned 10,000*l.*, and pay, to Lady Astley, the interest and dividends thereof, during her life; and, after her decease, to pay the last mentioned 5,000*l.* also to Edward John Astley, Henry Nicholas Astley, and William Coke Astley, in equal shares, when they should attain the age of twenty-one years, with benefit of survivorship in case any of them should die before they attained that age; and, in case they should all die before they attained that age, to pay the last-mentioned sum of 5,000*l.* to Bernard Astley and Richard Astley, in equal shares, when they should attain their ages of twenty-one years, with benefit of survivorship as before stated; and, in case Bernard Astley, Richard Astley, Edward John Astley, Henry Nicholas Astley, and William Coke Astley should all die before they should attain their respective ages of twenty-one years, to pay the two last-mentioned sums of 5,000*l.*, and 5,000*l.* to Lady Astley, her executors, administrators and assigns.

The leases of the rectory and hereditaments, bequeathed by the will of Richard Warner, were, from time to time, during the life of the first-named Mary Milles, renewed in her name.

\*Mary Milles died in or about the month of October, 1781, leaving [\*303] Richard Milles, her eldest son and heir male of her body, her surviving. After her decease, the leases of the rectory and hereditaments were, from time to time, renewed in the name of Richard Milles, and, particularly by an indenture dated the 3d of June, 1800, whereby the dean and chapter of Norwich did, on the surrender of the then existing lease, demise, unto Richard Milles, the site of the rectory of North Elmham, and certain lands, tithes and hereditaments therein described (being parcel of the leasehold hereditaments bequeathed

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1827.—*Astley v. Milles and others.*


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by the will of Richard Warner) to Richard Milles, for twenty-one years : and also, by another indenture, bearing even date with the last indenture, whereby the dean and chapter did, on the surrender of the then existing lease, demise, to Richard Milles, certain lands and hereditaments in Gately and Colkirk, in the county of Norfolk, being the remainder of the leasehold premises bequeathed as before described, except a wood in Gately, and one grovite there, and one other grovite in Colkirk ; to hold the same, except as therein excepted, unto Richard Milles for twenty-one years.

By an indenture, dated the 30th of September, 1801, and enrolled as the law requires for conveyances of estates sold to purchase or redeem the land tax, and made between the dean and chapter of the first part, two of the commissioners for the redemption and sale of the land tax of the second part, Richard Milles of the third part, and Thomas Wodehouse, Esq., of the fourth part, after reciting that the dean and chapter being desirous of availing themselves of the powers which, by certain acts passed for the redemption and purchase of land [\*304] \*tax, were given to bodies corporate and companies, enabling them to sell a competent part of their manors, messuages, lands, tenements and hereditaments, for redeeming or purchasing their land tax, had agreed to sell to Richard Milles the site of the rectory or parsonage, lands, tenements and hereditaments thereafter described for 5,967*l.* 10*s.* 1*d.* (exclusive of 562*l.* 7*s.* 3*d.*, the value of the full grown timber growing thereon,) and which two sums amounted to the sum of 6,529*l.* 17*s.* 4*d.* and that the commissioners had agreed to confirm such contract, and that Richard Milles had redeemed the land tax of the estate with his own money ; it was witnessed that, in consideration of 562*l.* 7*s.* 3*d.*, paid by Richard Milles to the dean and chapter, in discharge of the costs and expenses attending sales made by the dean and chapter for the redemption of their land tax ; and in consideration of 5,967*l.* 10*s.* 1*d.*, by Richard Milles, paid into the bank of England to be placed to the account of the commissioners for the redemption of the national debt, the dean and chapter did, in exercise of the powers vested in them by the several acts therein referred to, convey, and the commissioners did confirm, unto Thomas Wodehouse, and his heirs, the site of the rectory or parsonage, lands, tenements and hereditaments comprised in the leases, and also the woods, lands and hereditaments excepted out of the last-mentioned lease, upon trust to convey the same to the uses expressed in the next stated indentures.

By indentures of lease and release, dated the 1st and 2d of October, 1801, the release made between Thomas Wodehouse of the first part, Richard [\*305] and Milles of \*the second part, the commissioners of the third part, and Lewis Thomas Watson Lord Sondes of the fourth part ; after reciting that Milles was desirous that the immediate estates and interests in the hereditaments and premises under the subsisting leases thereof, as well as the reversions in fee expectant thereon, and also, the woods, lands and hereditaments excepted out of the last-mentioned lease, but purchased by Milles as aforesaid, might be charged with the re-payment to him of the purchase money and

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 1827.—*Astley v. Milles and others.*


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interest, and that, subject to such charge, the same woods, lands and hereditaments, as well as the reversion of the leasehold hereditaments, might be conveyed in manner after-mentioned; it was witnessed that, in pursuance of the directions contained in the acts therein mentioned for the redemption and sale of the land tax, Thomas Wodehouse conveyed, to Lord Sondes and his heirs, the rectory and parsonage and other hereditaments comprised in the last indenture, to the use of Lord Sondes, his executors, administrators and assigns, for 1,000 years, and, subject thereto, to and for such of the uses, trusts and purposes expressed in the will of Richard Warner, concerning his freehold estates thereby devised to his daughter Mary Milles with such remainder over as aforesaid, and which precede the limitations to the heirs male of her body, as were then capable of taking effect: and, after the determination of the said several lives and estates then subsisting, which preceded the limitation to the heirs male of the body of Mary Milles, then to the use of the heirs male of the body of Mary Milles, and, for default of such issue, to the use of the right heirs of Richard Warner for ever, subject to a proviso for cesser of the term of 1,000 years, in case the person or \*persons who should, for the time [\*306], being, be entitled to the premises subject to that term, should pay to Richard Milles, his executors, administrators and assigns, the sum of 6,529*l.* 17*s.* 4*d.*, with interest, on the 2d of April then next: provided that the persons who should, from time to time, be entitled to the rents of the hereditaments thereby released, subject to the term of 1,000 years, should be charged with the payment of the interest of 6,529*l.* 17*s.* 4*d.* which should accrue during his estate in the same hereditaments, and that no greater arrear than one year should be recoverable against any person who should become entitled in remainder, for interest accrued during the estate or term of any person entitled to any preceding estate in the premises, and that Richard Milles, his executors and administrators should, from thenceforth, stand possessed of the premises, demised to him by the two leases of the 3d of June, 1800, in the first place, as a security to him for the payment of the 6,529*l.* 17*s.* 4*d.* and interest, and, subject thereto, upon and for such trusts and purposes as the same premises were then liable to in manner before mentioned.

The act of parliament by virtue of which the commissioners were made directing parties to the last mentioned indenture, was the 39th Geo., 3. c. 108; by the 8th section of which it is enacted that, where the reversion of any manors, messuages, lands, tenements or other hereditaments, holden under any body politic or corporate, or company, as therein mentioned, by virtue of any lease for one or more life or lives, or for years absolute or determinable on the dropping of one or more life or lives, or by copy of court roll, or customary tenure for life or lives, should be \*purchased under the powers [\*307] of the same act, or of any acts therein mentioned, by or with the money of the persons for the time being beneficially entitled to the rents and profits thereof; and where such lease or leases should be subject to any will or settlement, so that such person should not, at the time of purchasing the re-



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1827.—*Artley v. Milles and others.*

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version thereof, be entitled to the absolute interest under such lease or leases, then the reversion should be settled, under the direction of the commissioners appointed as therein mentioned, in such manner as that the amount of the money paid for purchase thereof, with lawful interest, might be a charge on such reversion for the benefit of the persons advancing the same, their executors, administrators or assigns; and that, subject thereto, the fee-simple of such manors, messuages, lands, tenements or other hereditaments, should be settled, under the like direction, for the benefit of the persons so purchasing the same, and of such other persons as would have been entitled, under such will or settlement, to the benefit of any renewed lease or leases for the time being, and so as to be enjoyed by them for such respective estates and interests as, considering the alteration of the tenure, should appear to the commissioners most correspondent with the intention of such will or settlement: provided that it should be lawful for the commissioners to direct an application to be made to the court of chancery, in a summary way, for obtaining direction as to the mode of settling any such reversion, where the case should appear to them to be attended with difficulty.

By an indenture, dated the 21st of June, 1808, endorsed upon the before-stated deed-poll, and made between Mary Milles, daughter of the first-  
[\*308] named \*Mary Milles, of the first part, Richard Milles, of the second part, and William Deedes, esquire, of the third part, after stating that the first-named Mary Milles had departed this life, and that Mary Milles, party thereto, would, under the appointment contained in the deed poll, become entitled, after the deceases of Richard Milles and John Milles, and after failure of issue male of their respective bodies, to the principal sum of 10,000*l.* to be raised as therein mentioned, with interest at four per cent per annum, to be computed from the decease of the survivor of Richard Milles and John Milles, or from the time of the failure of such issue male, and that Mary Milles, party thereto, had agreed, with Richard Milles, for the sale to him of her interest in the 10,000*l.* and all interest to accrue thereon, for the sum of 5,250*l.* and that Richard Milles was desirous that the same should be assigned to Deedes upon the trusts thereafter expressed, Mary Milles assigned to Deedes the said sum of 10,000*l.*, together with all interest that should accrue thereon, upon trust to dispose of the same unto such persons, in such shares as Richard Milles should, by any deed under his hand and seal, to be attested by two or more creditable witnesses, or by his will, attested in like manner, direct; and, in default thereof, in trust for Richard Milles, his executors, administrators and assigns.

John Milles, in or about the month of October, 1810, sold to Richard Milles the 5,000*l.* by the deed poll appointed, by the first-named Mary Milles, to be paid to the executors, administrators and assigns of him, John Milles, in the events before mentioned, together with all interest that should accrue thereon, for 3,333*l.* and the same was assigned by John Milles to William  
[\*309] \*Deedes, in trust for Richard Milles, by an indenture dated the 12th of

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October, 1810, endorsed upon the deed poll, similar, in point of form, to the last stated indenture.

William Coke Astley died under age, leaving Henry Nicholas Astley and Edward John Astley him surviving, who both lived to attain the age of twenty-one years.

In January, 1817, Henry Nicholas Astley sold to Richard Milles the 2,500*l.* (to which he was entitled, in the events before mentioned, under the appointment made by the first-named Mary Milles by the deed poll,) together with all interest that should accrue thereon, for 1,992*l.* 10*s.*; and the same was assigned by Henry Nicholas Astley, to William Deedes, in trust for Richard Milles, by an indenture dated the 28th of January, 1817, endorsed upon the deed poll, and similar, in all respects, to the two last indentures.

Neither Richard Milles nor John Milles had any issue male. Richard Milles had issue one daughter only, Mary Elizabeth Milles; who, in November, 1785, intermarried with Lewis Thomas Lord Sondes, since deceased, by whom she had issue four sons and two daughters. Lady Sondes died in September, 1818, leaving Lewis Richard Lord Sondes her eldest son and heir at law, and heir of her body. John Milles died previously to the execution of the next-mentioned indentures.

By indentures of lease and release, dated the 24th and 25th of November, 1819, the release made between Richard Milles, of the first part, Lewis Richard Lord \*Sondes, of the second part, Thomas Atkinson, [\*310] Gent., of the third part, and Thomas Starr, Gent., of the fourth part, after reciting that, by indentures of lease and release of the 13th and 14th of December, 1773, and by a common recovery suffered in pursuance of an agreement contained in the said indenture of release, and a declaration of the uses of that recovery contained in the same indenture, and by reason of the determination or failure of divers estates, uses and interests limited or created by the same indenture, the manors, messuages, advowsons, farms, lands, tenements and hereditaments thereinbefore mentioned to be comprised in the same indentures of lease and release and recovery, then stood limited to the use of Richard Milles and his assigns, for life, with remainder to the use of his first and other sons, successively, according to the priority of their births, in tail male; with remainder to John Wodehouse and Lewis Cage, for 500 years, upon certain trusts declared of the same term, being trusts for raising, after the deceases of Mary Milles, Richard Milles and John Milles, (who was then since dead without issue,) and after failure of issue male of Richard Milles and John Milles, the sum of 25,000*l.* to be paid to such persons, at such times, and in such shares, manner and form as Mary Milles should, by deed or will, to be by her sealed and delivered in the presence of two or more credible witnesses, direct or appoint, being a sum of 25,000*l.* of which an appointment was made by Mary Milles, by a deed poll, dated the 24th of October, 1775; with remainder to Lewis Richard Lord Sondes in tail, as being the eldest son of Mary Elizabeth Milles, afterwards the wife of Lewis Thomas Lord Sondes,

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and who was the only daughter of Richard Milles; with divers re-  
 [\*311] mainders \*over; and, after reciting that there was no issue male of

Richard Milles, nor any probability of any issue male of him, and that Richard Milles agreed to purchase, of Lewis Richard Lord Sondes, the benefit of the remainder in tail of Lord Sondes in the manors and other hereditaments, and that the price to be paid for the same remainder in tail, or reversionary interest, and of a recovery to be suffered to bar the same entail and the remainders expectant thereon, was 42,000*l.*: it was witnessed that, in consideration of 42,000*l.* to Lewis Richard Lord Sondes, paid by Richard Milles, for the purchase of the estate and interest of Lewis Richard Lord Sondes in the manor, messuages and other hereditaments thereafter released, Richard Milles conveyed, and Lord Sondes conveyed and confirmed to Thomas Atkinson, his heirs and assigns, the aforesaid manor, advowson and hereditaments, to the intent that a common recovery might be suffered thereof, which should enure to confirm all estates and interests which were limited, by the thereinbefore recited indentures of lease and release, prior to the estate tail then or then lately vested in Lewis Richard Lord Sondes, and to all powers annexed or collateral to the same estates and interests, and to all estates, interests and charges which had been created by virtue of the same powers, and were then subsisting; and, subject thereto, to the use of Richard Milles, his heirs and assigns for ever. A common recovery was accordingly suffered as of Michaelmas term, 59th Geo. 3.

Richard Milles, by his will dated the 2d of December, 1818, gave all his manors, farms, tenements and hereditaments, in North Elmham, Gately, Colkirk, Beetley and Stanfield, and elsewhere, in the county of  
 [\*312] \*Norfolk, and also the site of the rectory and parsonage, and the advowson to the vicarage or church of Elmham, subject, as to the said manors and estates, to such charges and incumbrances as might be charged thereon at the time of his decease, to the honorable George Watson, senior, and Sir Henry Oxenden, Bart, for 500 years from his decease, and, subject thereto, to the use of his grandson, the honorable George John Watson, during his life, with remainder to trustees to preserve contingent remainders; with remainder to the first and other sons of his said grandson, successively, in tail male; with remainder to the use of the testator's grandson, the honorable Henry Watson, during his life, with, remainders to trustees to preserve contingent remainders; with remainder to the use of the first and other sons of his last-named grandson, in tail-male; with remainder to the testator's grandson, the honorable Richard Watson, during his life; with remainder to the same trustees to preserve contingent remainders; with remainder to the first and other sons of Richard Watson, in tail male; with remainder to the second and every other son, other than an eldest son, of his granddaughter, Mary Grace Lady Palmer, for life; with remainder to the same trustees to preserve contingent remainders; with remainder to the first and every other son of such second and every other son, other than a first and eldest son as aforesaid,

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successively, in tail male ; and, in default of such issue, to the use of his, the testator's, granddaughter, the honorable Catharine Watson, for her life ; with remainder to the same trustees to preserve contingent remainders ; with remainder to the second and every other son, other than and except a first and eldest son of the body of his granddaughter Catharine, successively, in tail male ; with \*remainder to his, [\*313] the testator's, nephew, the reverend Henry Nicholas Astley, for his life ; with remainder to the same trustees to preserve contingent remainders : with remainder to the first and every other son of his said nephew, then begotten, successively, in tail male ; with remainder to the right heirs of his nephew Henry Nicholas Astley : and the testator declared that the term of 500 years was limited to the trustees upon trust to raise and pay the several legacies therein bequeathed to his granddaughter Mary Grace Lady Palmer, Sir John Henry Palmer, his grand-daughter Catharine Watson, the children of his grand-daughter Lady Palmer, his sister of the last-named Mary Milles, and his nephew Henry Nicholas Astley, with a proviso for the cesser of the term on the trusts thereof being performed : and the testator directed the tenants for life, and all the other persons who should successively come into possession of the manors and hereditaments thereby devised, to assume the name and arms of Milles only, within six months after his death, on pain of forfeiting the estates limited to them respectively : and he appointed his wife, Mary Elizabeth Milles, sole executrix and residuary legatee of his will.

By indentures of lease and release, dated the 29th and 30th of January, 1819, made between Richard Milles of the first part, George Stillyard King of the second part, and Thomas Starr of the third part (the release reciting that Richard Milles had determined to suffer a recovery of the messuage and rectory purchased of the dean and chapter of Norwich, comprising the hereditaments formerly leasehold devised by Richard Warner, and to limit the same to himself in fee, \*discharged of all estates tail) and by a recovery [\*314] duly suffered accordingly, the last-mentioned hereditaments were conveyed and assured to the use of Richard Milles in fee.

Richard Milles, made a codicil, dated the 17th February, 1820, and, after stating that, since making his will, he had suffered a recovery of certain messuages, lands and tenements in North Elmham, Gately and Colkirk, in Norfolk, and also of the site of the rectory and parsonage of North Elmham, which he purchased of the dean and chapter of Norwich, and that, by the deed to suffer the said recovery, the fee of the premises was vested in him, and he did, by that codicil, give the said hereditaments and premises so purchased by him, unto the honorable George Watson, senior, and Sir Henry Oxenden, Bart., the trustees in his will named, for the term of 500 years, and, subject thereto, to the use of his, the testator's, grandson, the honorable George John Watson, during his life, and, after the determination of that estate, to the use of the first and every other son of his said grandson, successively, in tail male, with remainders over to such and the same persons, and to and for such uses,

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estates and purposes as he had, by his will, devised his manors and all other his estates in Norfolk.

Richard Milles died, in September, 1820, leaving Lewis Richard Lord Sondes his eldest grandson and heir-at-law; and, after his decease, Mary Elizabeth Milles, his widow, proved his will. George John Watson assumed the name and arms of Milles only, as directed by the will.

[\*315] \*Mary Elizabeth Milles made her will, dated the 9th November, 1820, and thereby, amongst other legacies, left 200*l.* to the plaintiff, Mary Ann Elizabeth Astley; and she also left legacies, altogether to a large amount, to the defendants, Henry Nicholas Astley, Mary Grace Lady Palmer, and her grandchildren Henry Watson, Richard Watson, Catharine Watson, and George John Milles, and appointed the said George John Milles her executor and residuary legatee. Mary Elizabeth Milles died in September, 1823: and, after her decease, George John Miles proved her will.

The bill, after stating to the effect aforesaid, alleged that the 10,000*l.* by the deed poll appointed by the first-named Mary Milles to be paid to Mary Milles, the daughter, and by her sold and assigned to Richard Milles, and the 5,000*l.* in like manner appointed to be paid to the executors, administrators and assigns of John Milles, and by him sold and assigned to Richard Milles, and also the 2,500*l.*, part of the 10,000*l.*, in like manner appointed to be paid to Henry Lee Warner and John Astley, in trust as aforesaid, to which Henry Nicholas Astley would have been entitled, and which was by him sold and assigned to Richard Milles, and the 6,529*l.* 17*s.* 4*d.*, by the term of 1,000 years, created by the indentures of lease and release of the 1st and 2d October, 1801, secured to be paid to Richard Milles as before mentioned, formed part of his personal estate at the time of his decease; and that Mary Elizabeth Milles, his widow, became entitled thereto as residuary legatee named in his will, and that the same sums of money, with the interest due thereon, formed part of

the personal estate of Mary Elizabeth Milles at the time of her de-  
[\*316] cease: that Richard Milles, in his lifetime, \*always considered those sums as part of his personal estate, and Mary Elizabeth Milles also, in her lifetime, always considered them and the interest due thereon as part of her personal estate, and, at the time of making her will, calculated upon those sums and the interest due thereon for the payment of the legacies given by her will; and that her personal estate, independently of those sums and the interest due thereon, was, at the time of making her will and of her death, wholly insufficient for the payment of the legacies given in her will: that Mary Milles, the sister of Richard Milles, died after his decease, having made her will, dated the 11th of May 1816, and thereby appointed Edward William Corry Astley and the said Richard Milles executors thereof; and that, since her decease, Edward William Corry Astley had proved her will: that Lewis Thomas Lord Sondes died many years ago, having, in his lifetime, made his will, dated the 2d of May, 1803, and thereby appointed the honorable George Watson, senior, and the honorable Henry Watson, executors thereof, who since his de-

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cease had proved his will : that the defendants Lewis Henry Palmer, Geoffrey Palmer, Theodosia Mary Palmer, Charlotte Palmer, Grace Palmer, and George John Palmer, were the only children of Mary Grace Lady Palmer, and that Catharine Watson was then unmarried : that dame Ann Astley, wife of Sir Edward Astley, died many years ago : that Lewis Cage died, some years ago, leaving John Lord Wodehouse him surviving, and that he (Lord Wodehouse) had, since the decease of Richard Milles, raised and paid, or was immediately about to raise and pay, by the means directed by the indentures of the 13th and 14th of December, 1773, the 10,000*l.*, by the deed poll of the 24th October, 1775, by the fine named Mary Milles, directed to be \*paid to Henry Lee Warner and John Astley, upon trust as in the [\*317] deed poll mentioned, with the interest thereon, except the 2500*l.*, part of the last mentioned 10,000*l.*, to which Henry Nicholas Astley would have been entitled as aforesaid, and which was by him sold and assigned to Richard Milles, as before mentioned : that John Astley died, many years ago, leaving Henry Lee Warner him surviving, who afterwards died, having appointed Daniel Henry Lee Warner his executor : that George John Milles had issue one son only, George Watson Milles, who was the first tenant in tail of the estates devised by Richard Milles : that the 10,000*l.*, 5,000*l.*, 2,500*l.*, as also the 6,529*l.* 17*s.* 4*d.* ought to be raised and paid to George John Milles, for the purpose of enabling him, by that means and the other estates and effects of Mary Elizabeth Milles, to pay the legacies given by her will. The bill charged that these sums formed part of the personal estate of Richard Milles, at the time of his decease, and that Mary Elizabeth Milles became entitled thereto as his residuary legatee, and that the same were always considered by Richard Milles as part of his personal estate down to the time of his decease : that the words in his will : "Subject, as to my manors and estates, to such charges and incumbrances as may be charged thereon at the time of my decease," had an express reference to such of the said sums of money as were charged on the manors and estates comprised in his will : that Mary Elizabeth Milles always considered those sums as part of her personal estate ; that she calculated those sums as part of her personal estate in giving the legacies given by her will, for the payment of which her other personal estate and effects at the time of making her will, and of her death, were wholly inadequate : that several of \*the legacies given by her will were given to George John [\*318] Milles and others of the parties defendants thereto, who, under the will and codicil of Richard Milles, were entitled to estates and interests in the hereditaments charged with those sums of money : that, in case those sums did not form part of the personal estate of Richard Milles, and Mary Elizabeth Milles did not become entitled thereto as his residuary estates, yet, by reason of her considering herself entitled to such sums, and the interest thereon. and her intention to dispose of and her having disposed of the same by her will, George John Milles, and such other persons as aforesaid, ought to be put to their election whether to take under the will of Mary Elizabeth

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Milles or against it; and that, in case they elected to take under the will, then they ought, to the extent of their respective estates and interests in the hereditaments under the will and codicil of Richard Milles, to confirm the disposition made by Mary Elizabeth Milles of those sums. The bill prayed that it might be declared that the 10,000*l.*, 5,000*l.* 2,500*l.*, and 6,529*l.*, 17*s.* 4*d.* formed part of the personal estate of Richard Milles at his decease, and that Mary Elizabeth Milles, his widow, became entitled thereto, as the residuary legatee named in his will, and that those sums might be raised by sale or mortgage of the hereditaments comprised in the term of 500 years created by the indentures of the 13th and 14th of December, 1773, and the common recovery suffered in pursuance thereof, and by sale or mortgage of the messuage or tenement, rectory and hereditaments comprised in the term of 1,000 years, created by the indentures of the 1st and 2nd of October, 1801; and that those sums, when so raised, might be paid to George John Milles, and be by him [\*319] applied, together with the other personal estate of Mary Elizabeth Milles, in a due course of administration; and, in case the court should be of opinion that those sums did not form part of the personal estate of Richard Milles, and that his widow did not become entitled thereto, as the residuary legatee named in his will, then that it might be declared that Mary Elizabeth Milles intended to dispose of and that she did in fact dispose of those sums by her will, and that George John Milles and such other of the defendants as were legatees named in her will and also took interests under the will and codicil of Richard Milles in the hereditaments charged with those sums, ought to elect, and that they might be put to elect whether to take under the will of Mary Elizabeth Milles or against it; and, in case they should elect to take under her will, then that they might be ordered, to the extent of their respective estates in those hereditaments, to confirm the disposition, made by Mary Elizabeth Milles, of those sums of money; and, in case they elected to take against her will, then that they might be ordered to give up all their interests under her will for the benefit of the plaintiff and the other legatees named therein.

The defendant, George John Milles, by his answer, denied that the sums in question formed part of Richard Milles' personal estate at his decease, or at any other time subsequently to his purchase of the remainder in tail of the estates from Lewis Richard Lord Sondes: and he submitted that those sums had become merged or extinguished in the inheritance of the hereditaments originally charged therewith: and he said that Richard Milles intended that they should be extinguished for the benefit of the persons entitled to the estates charged therewith: that the words in Richard Milles' will, particularly [\*320] referred to in the bill, had not any reference to such of the sums as were charged on the estates comprised in his will, but referred, wholly or principally, to the charge or charges to the extent of 7,500*l.*, part of the 25,000*l.*, which was not purchased by Richard Milles, as also to the particular charges to which the estate purchased of the dean and chapter of Norwich were made subject, under the leases thereof and the conveyance of

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the reversion thereof by the dean and chapter, under the direction of the commissioners: he admitted that the personal estate of Mary Elizabeth Milles, independently of the sums in question, were greatly inadequate for payment of the legacies given by her will, and that she, finding that her right to those sums was not admitted, determined to file a bill in this court for the purpose of establishing her right thereto, and that she had given instructions for the filing of such bill, and that the draft was prepared and would have been filed if she had not died at the time she did: he also admitted that several of the legacies given by the will of Mary Elizabeth Milles to him, the defendant, and to others of the defendants who were entitled, under the will and codicil of Richard Milles, to estates and interests in the hereditaments charged with the sums of money; but said that those defendants ought not to be put to their election whether to take under or against the will of Mary Elizabeth Milles.

Mr. *Starr*, a solicitor, who was one of the witnesses in the cause, deposed that, about November, 1818, he was professionally concerned, for Richard Milles, in a purchase made by him from Lewis Richard Lord Sondes, of the benefit of the remainder in tail of Lewis Richard Lord Sondes, in the manor of North Elmham, \*Nowers, and other manors and estates in [\*321] Norfolk; and that, in estimating the gross value of such benefit, a sum of 25,000*l.*, which was considered by Milles and Lord Sondes, as a charge upon the estates, and in which sum the witness believed that the sums of 10,000*l.* 5,000*l.* and 2,500*l.* were considered by Milles to be included, was deducted from such gross value, and that a sum of 6,800*l.*, which was considered by Milles and Lord Sondes as a charge upon an estate purchased of the dean and chapter of Norwich by Milles, the rent of which estate was included in the gross rental of the first-mentioned estate, was also deducted from such gross value: that he was the solicitor of Mary Elizabeth Milles for two years and upwards before her death: that he believed that she considered the sums of 10,000*l.*, 5,000*l.* and 2,500*l.*, amounting together to 17,500*l.*, as part of the personal estate of Richard Milles, and as part of her own personal estate, down to the time of her death; because, in her character as the sole executrix of the will of Richard Milles, when she proved the same she did, in computing the amount of the value of the personal estate of Richard Milles, at the time of his death, include a sum of 17,500*l.* his proportion of a charge upon an estate in Norfolk; and did also, in the like character, and as the residuary legatee named in the will of Richard Milles, include a similar sum of 17,500*l.* in the particulars of the account of his personal estate, which was sent to the legacy duty department; and because, in conversations with Mary Elizabeth Milles, upon the subject of the 17,500*l.*, she considered it as part of her property: that Mary Elizabeth Milles did, in her life-time, determined to file a bill, for the purpose of establishing her right to these sums of 10,000*l.*, \*5,000*l.* and 2,500*l.*, but she never mentioned to him the [\*322] sum of 6,529*l.* 17*s.* 4*d.*; and that she gave instructions to him for the



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filing such bill, and the draft of such bill was prepared, in or about Trinity term, 1823, and waited only for some necessary revision previously to the filing thereof; and that such bill would have been filed in the ensuing Michaelmas term, if Mary Elizabeth Milles had not died at the time she did.

Thomas Smith, another witness, and who had been Richard Milles' solicitor, from 1781 down to his death, deposed that Richard Milles, at the time he gave the witness instructions for his will, which was in the month of November, 1818, showed to the witness the deed of appointment, made by Mary Milles, his mother, charging his estates in Norfolk with the payment of 25,000*l.* upon which deed the discharges by Mary Milles, the daughter, and John Milles, for the sums of money to which they were entitled under the deed of appointment, were endorsed, and which discharges so endorsed, Richard Milles told the witness were prepared by Messrs. Forster, Cook and Frere of Lincoln's Inn: that a discharge, from Henry Nicholas Astley, for the sum to which he was entitled under the said deed, was prepared by the witness: that witness did not know how the sum of 6,529*l.* 17*s.* 4*d.* was paid or discharged: that he believed that Milles considered the several other sums to be extinguished, as a charge on his estate, at the time he paid the same: that, in November, 1818, when Milles gave the witness instructions for his will, he said to the witness: "Mr. Smyth my mother had a power to charge this estate (meaning the North Elmham estate) with 25,000*l.*; this would have [\*323] been a heavy incumbrance upon the estate \*I shall give to my grandson, George John. The charges which I have paid to my brother John, and sister Mary, I have paid out of my own money; and I intend my grandson should have the estate discharged from them; for I do not consider the moneys I have paid as a debt due to myself:" that he also said to the witness: "if you have not seen the deed creating the charge, I will show it you;" upon which he produced a deed of appointment, by Mary Milles, his mother, creating a charge of 25,000*l.* on the estate belonging to him at North Elmham and in other parishes, upon which the discharges from Mary Milles, the daughter of John Milles, were endorsed: that the witness inspected the deed, and said to Milles: "your paying these sums is a great act of kindness and affection towards your grandson."

Mr. *Pepys*, and Mr. *Boteler*, for the plaintiff:—The question in this case arises upon the transactions which took place in the year 1818. In that year Richard Milles, who had then a life interest in the estates, acquired, by a conveyance and recovery, the reversion in fee-simple: and the question is, whether he intended that the charges which he had bought up should be merged. In discussing this question, it is very important that the language of the release of 1818 should be attended to. Now that deed not only recites the trusts of the term of 500 years, but expressly declares that all the charges on the estates should be kept alive. And there was an evident reason for this: for Richard

Milles had not the absolute and entire dominion over the property, but [\*324] only a life interest in it, with the reversion in fee, which was \*subject

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to be defeated by other persons coming into existence, who would have taken estates tail in it. In the same year Milles made his will; and the language of it is in accordance with the deed: for he devises his manors, &c. subject to the charges that might be thereon at the time of his decease. Can it be said that these charges did not exist, when, only a month before, he had said that they should exist? Would he have inserted these words in the deed and in his will, if he had intended that the charges should be merged? Besides, Milles did not buy up the whole 25,000*l.*, but left 7,500*l.* outstanding; and it could not be his intention to purchase the 17,500*l.* for the benefit of the persons entitled to the remaining charges. *Lord Compton v. Oxenden*,<sup>(a)</sup> and *Forbes v. Moffat*.<sup>(b)</sup>

2d. As to the leaseholds. Not only by the acts done by Richard Milles, but by the provision of 39th Geo. 3, c. 108, the money paid for the purchase of the reversion remained the property of Richard Milles down to the time of his death.

3d. It is quite clear that Mrs. Milles considered the amount of these charges as part of her personal estate; and the defendants who claim benefits under her will must at all events be put to their election.

The VICE-CHANCELLOR:—Must not the election arise upon the face of the will: and can extrinsic evidence be given in order to raise a case of election.<sup>[1]</sup>

\*Mr. *Pepys*:—On the authority of *Druce v. Denison*,<sup>(c)</sup> the plaintiff is entitled to prove extrinsic matter, in order to put the defendants to their election.

Mr. *Tinney*, for some of the defendants whose interest was the same as the plaintiff's, said that if the court should infer that, because the charges were not mentioned in the codicil, the testator intended they should be merged, so for as they affected the estates devised by the codicil, it was fair to conclude that he intended them to remain as to the other estates.

Mr. *Shadwell*, Mr. *Sugden*, Mr. *Sidebottom*, and Mr. *Reynolds*, appeared for the defendant, George Watson, Milles, and other defendants in the same interest.

Mr. *Shadwell*:—The words: "subject to all charges," mean so far only as they were subsisting in the contemplation of the parties, that is, so far only as they were in the dominion of others. Until the recovery was completed, the charges were not merged; and therefore those words were introduced in order to show that Lord Sondes did not mean to convey an unencumbered estate. There is nothing in the will to show that it was the testator's intention to keep the 17,500*l.* as a subsisting charge. The recovery deed of 1819 manifests

(a) 2 Ves. jun. 261.

(b) 18 Ves. jun. 384.

(c) 6 Ves. Jun. 385.

[1] Lord Brougham expresses a decided opinion against its admissibility in *Dummer v. Pitcher*, 2 Myl. & K. 262. Such appears to be the impression of Lord Plunkett; *Cooke v. Briscoe*, 1 Dru. & W. 616. But Lord Cottenham leaves the question open. *Shuttleworth v. Greaves*, 4 Myl. & Cr. 37.

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that it was Milles' intention to make himself the absolute owner of the leaseholds. Besides, we have evidence which compels a court of equity to hold that Milles intended the charges to be merged.

[\*326] \*Mr. *Pepys*, Mr. *Boteler*, and Mr. *Tinney*, objected to the evidence being read, on the ground that it tended to raise, not to rebut, a presumption.

Mr. *Shadwell*, Mr. *Sugden*, and Mr. *Sidebottom*, contended that evidence might be given to show what was the view of the testator in the acts he was doing. *Pulteney v. The Earl of Darlington*,<sup>(d)</sup> and *Monck v. Lord Monck* :<sup>(e)</sup> that the evidence offered tended to show what was the view taken by the testator of his affairs : that the question was not what was the effect of a deed, or of a will, but whether it was the intention of Milles that the charges should be kept up : that Lord Hardwicke, C. had decided that a person might elect, by parol, whether he would have an estate that had been directed to be sold, or its produce :<sup>(f)</sup> that here Milles had declared, on a solemn occasion, that he intended the charges to be merged ; and that such a declaration of intention must be received as evidence.

Mr. *Pepys*, in reply as to the admissibility of the evidence, said that the question turned upon whether the evidence was given to raise or to repel a presumption : that Milles' acts did not give title to the defendants : that, if they did, the defendants did not want the aid of the parol evidence : that if an executor had a legacy given to him, or by any other means was made a trustee of the residue, the next of kin were never required to give evidence to

[\*327] show that the \*testator did not intend the executor to take the residue beneficially : that, if the manuscript case cited by Mr. *Sugden*, were law, parol declarations might be admitted to alter the nature of property : that if the defendant was entitled to hold the estates discharged of the sums of money, he was so entitled by the effect of a legal presumption, and could have no right to read the evidence in order to aid that presumption : that the question must be decided on the expressions of the instruments themselves : that those instruments expressed that it was Milles' intention that the charges should be kept up, and it was Milles' interest that that should be the case : and that the distinction between parol evidence, and evidence raised from solemn acts, was plain ; for that the most solemn declarations might be altered from day to day.

The VICE-CHANCELLOR decided that the evidence ought to be received ; because the court was to act upon the intention of Mr. Milles, and was therefore bound to hear all the evidence that could be fairly given upon that subject.

Mr. *Sugden*, for the defendants :—When Milles addressed himself to acquire the reversion in fee, there was no probability that the prior remainders would take effect. When he had accomplished that object, the charges which he had previously purchased became extinct in law. It is quite clear that he consi-

(d) 1 Bro. C. C. 223.

(e) 1 Ball & Beatt. 298.

(f) Mr. *Sugden* stated this to have been decided in a case of which he had a manuscript note.

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dered that there was an end of all the charges, or else he never would have given 42,000*l.* for the reversion. If he had not kept the charges on foot before he acquired the reversion, he would have \*increased Lord [\*328] Sondes' interest merely, and not his own. As he eventually became owner of the fee, as well as of the charges, what end could it answer to keep the latter on foot. So far from any declaration being necessary on the part of Milles to keep the charges subsisting, they must be held to be merged unless there is plain evidence of a contrary intention. If Milles had had born issue-male, the charges would have been cut out, as well as the reversion divested. Although the merger of the charges which were brought up, will benefit the persons entitled to the benefit of those that remain, that affords no argument against holding the former charges to be extinguished; for, if the owner of the inheritance of an estate pays off a prior charge, he thereby gives precedence to the subsequent encumbrances.

The words in the will: "subject as to the said manors and estates, to such charges and encumbrances as might be charged thereon at the time of his decease," do not extend to the rectory. But can it be supposed that the testator, intending to dispose of the rectory in the same manner as the rest of his estates, meant that the charges should subsist as to the one, and be merged as to the other? The words relied upon by the plaintiff relate to the 7,500*l.* only. If the testator had not considered the first term of 500 years to be merged, he would not have created another term for the purpose of raising money to pay his legacies, but would have directed the 17,500*l.* to be applied for that purpose. It is clear, therefore, that the charges became extinct, immediately upon the purchase from Lord Sondes, or, at all events, that they were destroyed \*by the will and codicil, which are a clear disposition of all Milles' [\*329] interest, both legal and equitable, in these estates.

The evidence, if it should be necessary to resort to it for the determination of the question, contains an express decision, by the testator, upon the subject.

Mr. *Sidebottom*:—A tenant in tail, or one having an estate of inheritance, cannot have, co-existing with his estate, and yet separate from it, a charge upon the same estate: when they come together in the same person they must merge. *Jones v. Morgan.*(g) *Countess of Shrewsbury v. Earl of Shrewsbury.*(h) *Donisthorpe v. Porter.*(i) *Lord Compton v. Oxenden.*(k) In this latter case the rule is laid down as the necessary legal result of the union of the estate and charge, and that the court, without express declaration to the contrary, must presume the intent of the owner of the inheritance, in buying off the charge, to have been to exonerate the inheritance from the encumbrance.

But then it is said, this presumption may be rebutted by express intent. We contend that there is no such expressed intent, and what the plaintiff adduces as such is easily explained away. In *Countess of Shrewsbury v. Earl of*

(g) 1 Bro. C. C. 206.

(h) 1 V. J. 227.

(i) 2 Eden, 162.

(k) 2 V. J. 261.

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*Shrewsbury*, it is laid down, as a general rule, that the true ground of the inference in favor of a tenant for life paying off an encumbrance, is the [\*330] scantiness of his estate; but this \*rule does not apply here. We must see what was the estate that Milles considered himself to have, and not what the estate was which he actually had. He evidently considered himself to have an estate of inheritance. His and his wife's ages precluded any idea of having any children. He so recites it in the deed under which he took the reversion from Lord Sondes. Besides, if he had had an intention to keep alive the charges, it is to be supposed that he would have plainly declared such intent: that intention, too, should have been declared at the time of purchasing the reversion. It is not sufficient that it was declared at the time of purchasing the land tax. In the long time intervening between the two purchases he may have changed his plan; besides, when he purchased the land tax, his estate was only for life.

In the purchased deed from Lord Sondes the covenants are absolute: there is no exception of incumbrances: and no conveyancer would have so framed them if the purchaser's intent had been to keep them alive. In that case the charges would have been excepted.

The next expression of intention is stated to be in the will. The words in the will are: "subject to such charges and encumbrances as may be charged thereon at the time of my decease." These words are satisfied by the charge of 7,500*l.*, the residue of the 25,000*l.*, which is admitted, on all hands, to be still existing; or he may have contemplated creating a new charge, and afterwards abandoned the intention. These words, indeed, rather imply that there were no charges existing at the time; for, otherwise, he would have [\*331] stated the \*devise to be subject to charges then existing, and which might be existing at the time of his death: the inference, therefore, is fairly the reverse of that contended for on the other side. In the codicil there is no reference to any charges. This is very material, and confirms the supposition that, at the date of his will, he contemplated to create charges, and that, in the interim between that time and the date of the codicil, he altered his plans.

Mr. *Reynolds* cited *Kelly v. Power*.<sup>(1)</sup> He said that a strong presumption of law could not, as to its legal effect, be resisted by any slight expression of intention. The argument, that the testator had a direct interest in keeping up the encumbrance for the benefit of his children, in case he should have any, falls to the ground, when it is remembered that, so far as the freeholds were affected, no charge was to arise in case of any son being born, the default of male issue being the event on which the encumbrance was to come into operation. Milles could not, therefore, have looked to the birth of sons; and the fair inference is, that, if he did not expect the birth of a son, he also did not expect the birth of a daughter, especially when it is remembered that he and

(1) 2 Ball & Beatt. 236.

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his wife were very old. He must therefore be considered as deeming himself, in effect, owner of the inheritance. If he expected to have children, why did he ever purchase the reversion from Lord Sondes? He must have known that if he should have children, his purchase money would be thrown away, because, under the original limitations, his children would have taken the same interest as he laid out his money in purchasing.

\*Mr. *Pepys*, in reply :—When no intention is expressed, it must be [\*332] perfectly indifferent, to the party in whom the interests unite, whether or not the charge should subsist, before the court will deem it merged. Now, in this case, it is evidently not a matter of indifference; for the birth of a son would have cut down Milles' estate. With regard to the evidence read on the other side to show the testator's intent, it does not make out the defendant's case. The want of direct evidence to show a distinct intention to merge the charges, is conclusive proof that the testator had no such intention.

After the argument was concluded, Mr. *Pepys* referred the court to *Drinkwater v. Combe*,<sup>(m)</sup> and *Wigsell v. Wigsell*.<sup>(n)</sup>

The VICE-CHANCELLOR :—I do not think the recitals in the deeds so important as is conceived. They were not introduced with a view to show the testator's intent to keep up the charges. If any such intent had existed, the parties would not have left it to a recital merely. In the covenants or some other clause, there would have been introduced evidence of such intent. The sole object of the recitals, as it appears to me, was to show solemnly under seal, that the money given was the full value under the circumstances; in fact to explain the reason of a sum, apparently so small, being given for it. Another object of the recital was, to show that the reversion was subject to a possibility of being defeated, and not sold as an absolute indefeasible estate.

\*The VICE-CHANCELLOR :—In this case the bill is filed by Mary [\*333] Ann Elizabeth Astley, the executrix and residuary legatee under the will of the widow of Richard Milles, deceased. The defendants are the Hon. George John Milles, who is the first tenant for life of the real estates devised by the will of that Richard Milles, and George Watson Milles, who is the son of George John Milles, and the first tenant in tail of these estates. There are several other defendants, but I need not specify their character; it is sufficient to say that they are either interested in the question as raised, concurrently with the plaintiff, or they are interested with the defendants, the tenant for life, and the tenant in tail, in the realty; or, in the character of trustees, are necessary, according to the forms of the court, to sustain the suit, by having all the parties before it. The prayer of the bill is, that it may be declared that certain estates in the county of Norfolk, devised by the will of Richard Milles, are subject to two charges, one of 17,500*l.*, and the other of 6,599*l.* 1*l.* 4*d.*, which are secured by certain outstanding terms, which belonged to the testator

<sup>(m)</sup> 2 Sim. & Stu. 340.<sup>(n)</sup> Ibid. 364.

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at the time of his decease, and praying that directions may be given for raising these charges for the benefit of the estate of Mrs. Milles, and applying them, as a part of her estates, in a course of administration. The bill has a prayer in the alternative, that, if the court should be of opinion that these sums ought not be raised, then, as the assets of Mrs. Milles will not satisfy her debts and legacies, those who take benefits under her will, and under the will of Richard Milles, may be put to their election between the two interests.

[\*334] \*As to the first head of the present case, I do not think it is governed, in all its points, by any distinct and separate authority which has been cited before me, nor by any authority I have found, after very diligent research on the subject. It must, therefore be decided by applying the rules laid down in those authorities, rather than by any direct precedent.

The facts of the case, as they appear, I shall state as concisely as the voluminous instruments will allow, in order to show the channels through which the lands, and the charges on those lands, became respectively vested in the testator; and I shall endeavor to apply the rules of the court as they are laid down in the various authorities.

(His honor here proceeded to state the will of Richard Warner.)

It is not necessary to encumber the case by stating the various charges made by the will of Richard Warner: they have all been satisfied, and no question arises on them. The testator, at his death, left his four grandsons surviving, and he left his daughters, Mary Milles, and Mrs. Joddrell, his co-heirs at law. It is to be collected, from the deed that is next stated, that Mary Milles, the daughter, and Richard Milles, the grandson, had acquired some other real estates which were their own property. In or prior to 1773, Richard Milles had attained the age of twenty-four years, and therefore he was in possession of the devised estates, as tenant for life. In that year he and his mother agreed to suffer a recovery of all the estates, and to re-settle them. When I say of all the estates, I mean the estates devised by Richard Warner, the

[\*335] \*ancestor, and likewise those estates that descended from him to his daughter Mary Milles, and those estates which Mary Milles, and Richard Milles, her son, had respectively acquired after the death of the testator. The son and the mother having that year agreed to suffer recoveries, and to re-settle the estates, as far as they could consistently with the existing limitations of the will of Richard Warner, by indentures dated the 18th and 14th of Dec., 1773, conveyed the whole of them to a gentleman of the name of Baxter, for the purpose of making a tenant to the præcipe, and to enable them to suffer a good recovery. That recovery was afterwards suffered: and that deed is the origin of one of the present questions. By it, the estates devised by Richard Warner, and the estates purchased by his daughter and his grandson, are limited to Richard Milles for life, with remainder to his first and other sons in tail-male, with remainder to John Milles, one of the devisees of Richard Warner, and to his first and other sons in tail-male, and with remainder to Mary Milles, the mother, for life, with remainder to Wodehouse and Cage as

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trustees, for the term of 500 years, and subject to that term, with remainder to each of the daughters of Richard Milles, for such estates-tail as he should appoint; and in default of appointment, to his daughters in tail-general, as tenants in common. It appears that at this time Christopher Milles, one of the grandsons, was dead; and that accounts for his not being included in the series of limitations of his grandfather's estate. The deed then contains a long series of limitations, calculated to preserve the estate in the family as far as the rules of law would permit. But, as all these limitations have been barred by the subsequent assurances, it seems unnecessary to encumber the cause by stating them in detail.

\*The uses of the term of 500 years, which was vested in Cage and [\*336] Wodehouse, are as follows: after the death of Mary Milles, and after the death of Richard and John Milles, and failure of their issue, (if that contingency happened,) to raise 25,000*l.*, and pay it to such persons as Mary Milles should, by deed or will, appoint. This deed having thus limited the estates in strict settlement, by an indenture, bearing date the 24th October, 1775, Mary Milles executed this power, and appointed the sum of 25,000*l.* By that instrument she appointed 10,000*l.* to her daughter, Mary Milles, 5,000*l.* to her son John Milles, and the remaining 10,000*l.* she appointed between the family of her second daughter, Lady Astley. The particulars of that distribution need not further be adverted to, beyond the fact that 2,500*l.*, a portion of that, afterwards became vested in Sir Nicholas Astley, one of Lady Astley's sons. Of course the benefit to arise under this appointment depended on the contingency that neither Richard Milles nor John Milles should have any issue-male. In 1801, Richard Milles contracted, with the dean and chapter of Norwich, to purchase the inheritance of the rectory of North Elmham. They were enabled to make the sale under the powers of the land tax redemption act; and the price agreed upon was a sum amounting, altogether, to 6,529*l.* 17*s.* 4*d.*, the sum of 5,967*l.* 10*s.* 1*d.* being the value of the estate, and the remainder being the value of the timber. The purchase-money was paid by Richard Milles, with his own money; and a conveyance was executed, in September, 1801, by the dean and chapter, by which they, at the requisition of Richard Milles, conveyed the estate to Wodehouse, in trust to be held upon the uses of the deed therein referred to as intended to be executed by the parties. That other deed, so referred \*to, appears to be executed in October, 1801; and it is material, for [\*337] the plaintiff's case, to observe that this conveyance recites that the immediate estate and interest in the then existing lease, as well as the reversion in fee expectant on these estates, should be charged with the repayment of the purchase money which Richard Milles so paid; and that, subject to that charge, the inheritance should be conveyed in the manner thereafter expressed. The deed then proceeds, in its operative part, to witness that, in pursuance of the direction and agreement of the parties, Wodehouse conveyed the rectory and lands to the use of Lord Sondes, for the term of 1,000 years,



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and, after the expiration of that term, to such of the uses of the will of Richard Warner as precede the limitation to the heirs male of the body of Mary Milles, as were then subsisting and capable of taking effect, with remainder to the heirs-male of the body of Mary Milles, with remainder to the right heirs of Richard Warner. These limitations plainly show that Richard Milles considered himself as purchasing the inheritance for the benefit of the persons entitled to the leasehold interest, under the will of Richard Warner; and that, I think, plainly shows that he did not, at that time, intend or contemplate the merger of the charge which was created by this purchase of the inheritance. It is upon this sum that the second question arises.

The title remained in this state till the year 1808. In that year Richard Milles purchased, from his sister Mary, her contingent interest in the 10,000*l.*; and, by an endorsement on the deed of appointment, dated the 21st of June, 1808, she, for a certain sum, assigned the 10,000*l.* to a person of the name of

Deedes, in trust to be disposed of as Richard Milles should appoint, [\*338] \*and, in default of his direction or appointment, in trust for Richard Milles, his executors, administrators and assigns. On the 12th October, 1810, Richard Milles purchased John Milles' contingent interest in the 5,000*l.*, and took an assignment by a similar indorsement upon the deed of appointment. In 1817, he purchased Henry Nicholas Astley's interest in the 2,500*l.*, and took a similar instrument of assignment.

Upon these sums, amounting together to 17,500*l.* the material question arises

In 1818, Richard Milles, having at that time no issue-male living, being very far advanced in years, his brother being dead without issue-male, seems to have formed a plan to create a new head to the family, which should bear his name, instead of permitting it to merge in the eldest grandson, Lord Sondes, who would not only be his heir at-law, but would be the existing head of the family, and would represent him as far as a man and his family could be represented through the female line. He therefore in that year contracted with his grandson, Lord Sondes, to purchase his reversionary interest in the estate in question; and the purchase-money being agreed at the sum of 42,000*l.*, a recovery was suffered, which barred all the limitations subsequent to that which gave to Lord Sondes, as tenant in tail in remainder expectant on the death of his grandfather Richard Milles, the estate-tail on failure of issue-male of Richard Milles. That expectant estate-tail in remainder was conveyed directly in fee, to Richard Milles, the purchaser. At this period John Milles was dead. The only

intervening contingency at that period was the event of Richard [\*339] Milles, the grandfather of Lord Sondes, having issue-male; \*and it appears, on the face of the record, that at that period Richard Milles must have been of the age of nearly seventy years; that he had his wife living, and that he contemplated her surviving him; and, therefore, he could not well have contemplated that he himself should have issue male to displace the ultimate remainder to the issue-female. In this situation, having completed the purchase from Lord Sondes, and being master of the fee, he made his

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will, dated the 2d September, 1818 : and, as several passages in that will have been referred to and represented, by each side, as affording inferences of intention on the part of the testator as to the merger or non-merger of the charges, those passages will deserve some observation. The general plan of the will is certainly a correct technical form of limitation. As far as it is necessary to detail them they are as follows. He devised the estates in Norfolk to trustees for a term of 500 years, and, subject thereto, to his second grandson, George John Watson, with remainder to George John Watson's first and other sons in tail-male, with remainders to his two other grandsons, Henry and Richard Watson, and their first and other sons in like manner, with remainders to his granddaughters, Lady Palmer and Miss Watson, for their lives, and to their second and subsequently born sons, in tail-male, with remainders to his nephew, Henry Nicholas Astley, for life, and to his first and other sons in tail-male, with remainder to the right heirs of Henry Nicholas Astley ; thus entirely passing over the female issue of all his grandchildren.

One cannot read these limitations without considering there was something capricious in the way the \*testator thought fit to show an [\*340] antipathy to the eldest sons of his grand-daughters. But it seems fair to infer that he did not take the estate out of the line of Lord Sondes, his immediate heir, from any particular objection to, or dissatisfaction with Lord Sondes ; but to have a younger branch of the family for his representative ; so that, if possible, his name might not merge in the dignity of Lord Sondes ; and, for that purpose, he imposed upon those who took the estates, the obligation of taking the name and bearing the arms of Milles. He then, having thus limited his estates, declares the trusts of the term of 500 years for raising certain pecuniary legacies. But that term of 500 years could not be brought into action without exhausting, first of all, the general personal estate of the testator ; and, if this bill is rightly framed with regard to the charges in question, the 17,500*l.* also must have been exhausted in payment of these legacies before the term of 500 years could have been brought into operation. He afterwards made a codicil, which does not affect the present question, and died ; and he left his widow his sole executrix and residuary legatee. He died some time after the year 1818.

These are the material facts on which the question arises, whether it is now, according to the rules of the court of equity, to be considered that these charges are subsisting, and that the estate passed, in equity, *cum onere*. That they are legal subsisting charges is not to be disputed ; because they are secured by an outstanding legal term : and the question then is, whether a court of equity is to lend itself to raise these charges under this state of facts, or \*whether it is to consider that the testator intended (for his inten- [\*341] tion constitutes the whole subject of right) that those charges should merge for the benefit of those who, under the limitations of his will, took the real estate.

The argument was gone through, on each side, very laboriously, and most

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ably ; and the court was greatly assisted, not only from the observations which fell from the bar, but likewise by reference to the authorities : and I think I may consider, though not exactly in the series and order in which the case was presented by the various counsel to the view of the court, the subject as represented thus : on the part of the plaintiff and those who are in the same interest, it was insisted that both the 17,500*l.* and 6,529*l.* 17*s.* 4*d.* ought to be raised for the personal representative of the testator, because they are secured by an outstanding legal estate ; and that there was no reason why a court of equity should prevent the exercise of those legal rights for the benefit of the personal representative, or refuse its concurrent authority in raising them. On the part of the defendants who are interested in the inheritance, it was insisted that the charges, though subsisting in law, ought to be considered, in equity, as merged for the benefit of the inheritance ; and, on both sides, it was taken, as a fact, that the testator, having an absolute interest in both the sums at the time of his death, the intention on his part, if it could be collected either by evidence, or by satisfactory legal implication, must prevail.

I think that the arguments on the part of the plaintiff, who insists [\*342] that the term ought to be put in action, and \*that the court ought to assist in raising the money, may be classed under three heads ; the first of which presents itself thus : that the testator had only a limited interest in the freehold up to the time of his death ; that the established rule of construction in a court of equity is thereby to raise the presumption that he did not intend the charges to merge in the inheritance : secondly, that the presumption arising from the effect of the testator's estate in the freeholds, is supported by the contents of the instrument which creates the charges : and, thirdly, that the language of the testator's will may be considered as containing a declaration plain that he intended the freehold should pass *cum onere*.

On the part of the defendant George J. Milles and the other defendants who are interested in the realty, I think their arguments may be divided under these heads : first, if the court is to regard the spirit, and not the letter of the authorities which establish the rule of construction, the testator was, in substance, the owner of the inheritance in fee, the intervening contingency being, from the circumstances of the testator and his family at the time, a mere shadow, and not a real risk which the court could regard. Secondly, if it is competent for the court to resort to technical presumption, in this case, to find out the testator's intention, the contents of the will taken in conjunction with the state of the title, afford a balance of presumption that he could not intend the estates to descend *cum onere*. But, lastly, it was contended that the court cannot resort to presumption where there is clear and direct proof of intention that the charges should sink for the benefit of the inheritance : and it is insisted that there is, in this case, positive and direct proof of such intention.

\*In cases of this kind it is much more easy to refer to the established rule of the court, than it is to apply that rule fitly to the circumstances of each case. The rules have fluctuated, in this respect,

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as to the quantity of the estate which shall raise a *prima facie* presumption of the intention of the owner that the charge should or not pass with the inheritance. In the case of *The Duke of Chandos v. Talbot*,<sup>(a)</sup> it appears that the court considered that a charge supported by a legal estate, was very different from one which was supported merely by an equitable title, or, in other terms, that the rule of intention, or presumptive intention, differed when the charge in the one case was supported by a legal outstanding estate, and in the other, where it was a mere equity attaching on the inheritance without any immediate legal estate. And, likewise, it appears, by the same case, that, where the owner of the land had an estate tail only, and not the fee simple, the court did not presume the intention of merger. The chancellor, in delivering his judgment, says: "Indeed had this been a mere equitable charge upon the land, and the fee simple, not an estate tail only, had come to Lewis Doleman the son, it might then have been a merger." In the case of *Chester v. Willes*<sup>(b)</sup> Lord Hardwicke, C. seems to have considered, at that time, that there was a distinction between a charge subsisting on an outstanding legal estate, and what was a mere equitable charge on an inheritance: he likewise seems to have considered that the quantity of estate which the party took made an exception to that rule. He refers to the case of *The Duke of Chandos v. Talbot*, and recognizes that principle as being the law. However, it may be now considered that, on this point, the \*rule of the court is settled, that [\*344] there is no difference between a charge merely equitable, and one that is supported by an outstanding legal estate, nor any difference between an estate tail, and a fee simple in possession. What is stated by Lord Eldon, C. in the case of *The Earl of Buckinghamshire v. Hobart*<sup>(c)</sup> will apply to this case. He says: "If a tenant for life pays off a charge on the estate, *prima facie*, he is entitled to that charge for his own benefit, with the qualification of having no interest during his life. If a tenant in tail, or in fee simple pays off a charge, that payment is, *prima facie*, presumed to be made in favor of the estate; but the presumption may be rebutted by evidence, as by calling for an assignment, or by a declaration." Now when Lord Eldon illustrates his position by giving a particular instance, I do not understand him as meaning to say that the rebutter is to depend on the fact of the calling for, or not calling for, an assignment of the charge. He only refers to it as a particular, distinct fact, which may or may not have any effect on the construction; and that the presumption, either way, may be rebutted by evidence. Lord Eldon never laid down any proposition of equity for which he had not ample authority. If he was about to reverse the rule laid down by Lord King in the case in *P. W.* and by Lord Hardwicke in the case in *Ambler*, I think he would have found no authority to support his different conclusion: but, on looking at the cases which intervene between the death of Lord Hardwicke, and the period of Lord Eldon's judgment, more especially cases in the time of Lord Thurlow and Lord Rosslyn, it is quite clear that he states the rule, not only as

(a) 2 P. W. 601, 604.

(b) *Amb.* 246.

(c) 3 Swans. 186, 199.

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[\*345] sanctioned by his own judgment, but as established by other \*antece-  
 dent decisions. It is extraordinary that, taking the rule to exist as it  
 has done, the great majority of the cases constitute not an adoption of the rule  
 itself, but an exception to the rule, that is, inferences and presumptions rebutting  
 the rule. There was one case before Lord Thurlow, *Jones v. Morgan*, (d)  
 where he states very strongly what would have been his opinion if it had been  
 an estate for life, and not an estate tail, as he considers it to have been.

There were two cases, before the late Vice-Chancellor, which struck me  
 very forcibly as deviating from this general principle; but on looking at those  
 cases, I am quite satisfied that those decisions are not any deviations from the  
 general rule; but they are only, under special circumstances of those particu-  
 lar cases, exceptions to the general rule. The cases I allude to are *Drink-*  
*water v. Comhe*, (e) and *Wigsell v. Wigsell*. (f)

I have looked most anxiously to apply the general rule consistently with the  
 acts of the testator, and I think that those acts do afford evidence that he did not  
 intend the estate to pass *cum onere*.

I think, however, that this case, without reference to intention, may be per-  
 fectly governed by the evidence of that solicitor who prepared the assignment  
 of the charges to Richard Milles. That evidence I have looked at; and  
 though some observations were made with regard to the nature and  
 [\*346] context of the evidence, I see \*nothing to raise any doubt that it was  
 given, with perfect impartiality, by a man of perfect integrity: and  
 that evidence does prove that it was the intention of the testator that the  
 charges should not be transmitted as a burden on the estate; and that it was  
 a mistake only of his legal adviser, that that intention was not recorded.

Having said thus much, being of opinion that the estates are not to pass  
*cum onere*, I propose my decree should stand thus: I decree that, under all the  
 circumstances of this case, the testator Richard Milles is not to be considered  
 as having intended that the manor and rectory of North Elmham, and the  
 several other manors, lands, tenements and hereditaments devised by the will,  
 should pass to the devisee, subject to and charged with the sums of 17,500*l.*  
 and 6,529*l.* 17*s.* 4*d.* and interest, or either of them, but that those charges  
 should merge for the benefit of the inheritance, and therefore declare that the  
 term of 500 years, created by the indenture of the 14th December, 1773, for  
 raising the 25,000*l.*, ought not to be used otherwise than for raising the sum of  
 7,500*l.* residue of that sum of 25,000*l.* appointed by Mary Milles under the  
 power contained in that deed: and that subject to raising that 7,500*l.* and in-  
 terest, the term ought to be held to attend upon and to protect the inheritance:  
 and declare also that the term of 1000 years, created by the indenture of the  
 2d of October, 1801, ought not to be used for raising the 6,529*l.* 17*s.* 4*d.*, or  
 any part thereof, but that the same ought to be held to attend upon and to pro-  
 tect the inheritance; and direct that the trustees of the said term do respectively  
 hold and use that term only for the uses and purposes aforesaid.

(d) 1 Bro. C. C. 206.

(e) 2 Sim. &amp; Stu. 340.

(f) 2 Sim. &amp; Stu. 364.

1827.—*Camac v. Grant.*

\*I have made no observation on the question of election. Indeed [\*347] that was considered to be a hopeless case in argument. Declare that the persons taking benefits both under the will of Richard Milles, and of Mary Milles, are not bound to elect under which they will take; but that they are entitled to claim and take under both wills; and dismiss the bill so far as it seeks to have the 17,500*l.* and 6,529*l.* 17*s.* 4*d.* raised, and paid as part of the personal estate of Richard Milles, and so far also as it seeks to put the defendants or any of them to an election; and refer it to the master to take the accounts of Mary Milles' estate in the usual manner; and then, respecting the costs of the suit, considering this a suit absolutely necessary for the purpose of settling the family estate, and that it arises from a claim, not a litigious one, and considering that George John Milles is the executor and residuary legatee of Mary Milles, and is also tenant for life of the freehold estates, direct that the costs of all parties in this suit shall be paid by George John Milles, out of the estate of Mary Milles, and reserve further directions and the costs of taking the accounts in the usual way.[1]

\*CAMAC *v.* GRANT.

[\*348]

1827; 12*th* May.—*Practice.—Costs.*

A plaintiff resident abroad, who had been ordered to give the security for costs but had not complied, ordered to give the security, and on default, his bill to be dismissed.

AN order had been obtained, in May, 1824, that the plaintiff, who was resident abroad, should give security for costs. The plaintiff not having obeyed this order,

Mr. *Knight*, for the defendant, now moved that the plaintiff might give the security before the first day of the next term, or that his bill might be dismissed.

The VICE-CHANCELLOR :—I am not aware of any authority upon this subject; but it appears to me that if a plaintiff will not conform to the practice of the court, the defendant has a right to have the bill dismissed.

Motion granted.[2]

[1] *Vide Lord Selcey v. Lord Lake*, 1 Beav. 146. *Tyler v. Lake*, 4 Sim. 351.

[2] *Acc. Martin v. Farrell*, 2 Hog. 151. But see *Memoranda*, 2 Sim. 570. The same practice was sanctioned by M'Coun, V. C. in *Hay v. Power*, 2 Edw. 494. By setting down the costs for hearing the plaintiff waives his order for security. *Ibid.* But serving notice of motion for security does not deprive him of his right to proceed with his cause, until an order is granted. *Lloyd v. Lord Trimbleston*, 1 Hog. 482. But whether the order to dismiss the bill for not giving security should be with or without costs seems to be undecided. *Hardwicks v. Warren, Sausse & Co.* 645. *Knight v. Lord De Blaquiere*, *id.* 648. *Powell v. Smith*, *id.* 654, 659, *n.*

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 1827.—Austin v. Prince.
 

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## AUSTIN v. PRINCE.

1827; 12th May.—*Practice*.—*Witness*.

A witness who had answered some of the interrogatories, but refused to answer the others, was ordered to answer those interrogatories within four days, or to stand committed.

A witness had answered some of the interrogatories, but refused to answer the others.

Mr. *Knight*, now moved, upon the examiner's certificate, that the witness might be ordered to answer the other interrogatories within four days, or stand committed: and the Vice-Chancellor ordered accordingly.[1]

[\*349]

## \*LEIGH v. LEIGH.

1827; 16th and 23d May.—*Pleading*.—*Fine*.

A fine and non-claim cannot be pleaded in bar to a bill to prevent the setting up of an outstanding term.

THE bill, which was filed on the 9th of December, 1820, stated that Edward Lord Leigh, at the times of making his will, and of his death, was, or claimed to be, seised of, or otherwise well entitled, in fee, to divers abbeys, parks, manors, messuages, farms, lands, tenements and hereditaments situate in the counties of Warwick, Stafford, Bedford, and Northampton; and that, being or claiming to be so seised and entitled, he duly made and published his last will and testament in writing, bearing date the 11th of May, 1767, which was executed and attested as is required by law for devising real estates, and thereby gave and devised to William Craven, esquire, and to the Reverend Edward Ludford Taylor, all his abbeys, parks, manors, messuages, farms, lands, tenements and hereditaments in the county of Warwick, for the term of 500 years, upon trust, to raise money to pay his just debts and funeral expenses and legacies; and subject to such term of 500 years, he gave unto and to the use of Craven and Taylor, and their heirs, during the lives of his sisters, the honorable Mary Leigh, and the honorable Anne Hackett, wife of Andrew Hackett, esquire, and the longest liver of them, in case he should die unmarried, all his abbeys, parks, messuages, farms, lands, tenements and hereditaments in the said counties of Warwick, Stafford, Chester, Bedford and Northampton, or elsewhere, and all other his real estates whatsoever which he should die possessed of, interested in or entitled unto, in trust to preserve the contingent re-  
 [\*350] mainders \*thereinafter mentioned; also, in case he died unmarried or without children, he gave, devised and bequeathed all the rents, issues and profits of all his abbeys, parks, manors, messuages, farms, lands, tene-

[1] Vide *Andrews v. Andrews*, 2 Johns. Cas. 109. *Jackson v. Mann*, 2 Caines' Rep. 92.

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1827.—Leigh v. Leigh.

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ments and hereditaments in the same counties, or elsewhere, subject as aforesaid, unto his sister Mary Leigh, for her life, and after her decease, unto her first son and the heirs male of his body, and, for default of such issue, to all other the son and sons of Mary Leigh, in tail male, successively, according to their seniority, and, for want of such issue, to the daughter or daughters of his sister Mary Leigh, and the heirs of her or their body or bodies lawfully issuing, to take, if more than one, as tenants in common, and not as joint tenants; and, for default of such issue, he gave, devised and bequeathed the same premises, subject as aforesaid, unto the said Anne Hackett, during her life, and, from and after her decease, to her first son and the heirs male of the body of such first son, and, for want of such issue, to all the other son and sons of the said Anne Hackett, in tail male, respectively and successively, according to their seniority; and, for want of such issue, he gave, devised and bequeathed all his said abbeys, parks, manors, messuages, farms, lands, tenements, hereditaments and premises in the said several counties of Warwick, Stafford, Bedford, Chester, and Northampton, or elsewhere, and all other his real estates which he should die possessed of or interested in, unto the first and nearest of his kindred, being male, and of his name and blood, that should be living at the time of the determination of the several estates thereafter limited and devised, and to the heirs of his body lawfully begotten, and, for want of such issue, to his own right heirs for ever. He also gave certain legacies, and appointed \*Mary Leigh his executrix: that the testator died in or about [\*351] the month of May, 1786, leaving the honorable Mary Leigh his heir at law: that the said honorable Mary Leigh was, under and by virtue of the said testator's will, entitled to an estate for life in the said devised estates, subject to the said term of 500 years vested in the said William Craven and the Reverend Edward Ludford Taylor; and that, shortly after the testator's death, she entered into the possession and into the receipt of the rents and profits of the said devised estates, and continued in the possession thereof until the time of her death after mentioned: that the said Anne Hackett died in the lifetime of the said honorable Mary Leigh without leaving any issue: that the said William Craven and Edward Ludford Taylor had long since paid all the debts and the legacies mentioned in the will, for the payment of which debts and legacies the said term of 500 years was created; and that, after payment of such debts and legacies the said William Craven and Edward Ludford Taylor held the said term in trust to attend the inheritance of the said devised estates comprised in the said term: that the said William Craven and Edward Ludford Taylor had both departed this life; and that the person or persons in whom the legal estate of the said term became vested on the death of the survivor of them, had assigned the said term to the defendant James Henry Leigh: that the honorable Mary Leigh had no issue; that she was a woman of a very weak mind; and that James Henry Leigh and the Reverend Thomas Leigh since deceased, and their solicitor, Joseph Hill, deceased, by undue influence and misrepresentations, procured the said Mary Leigh, who was entitled to the rever-



1827.—*Leigh v. Leigh.*

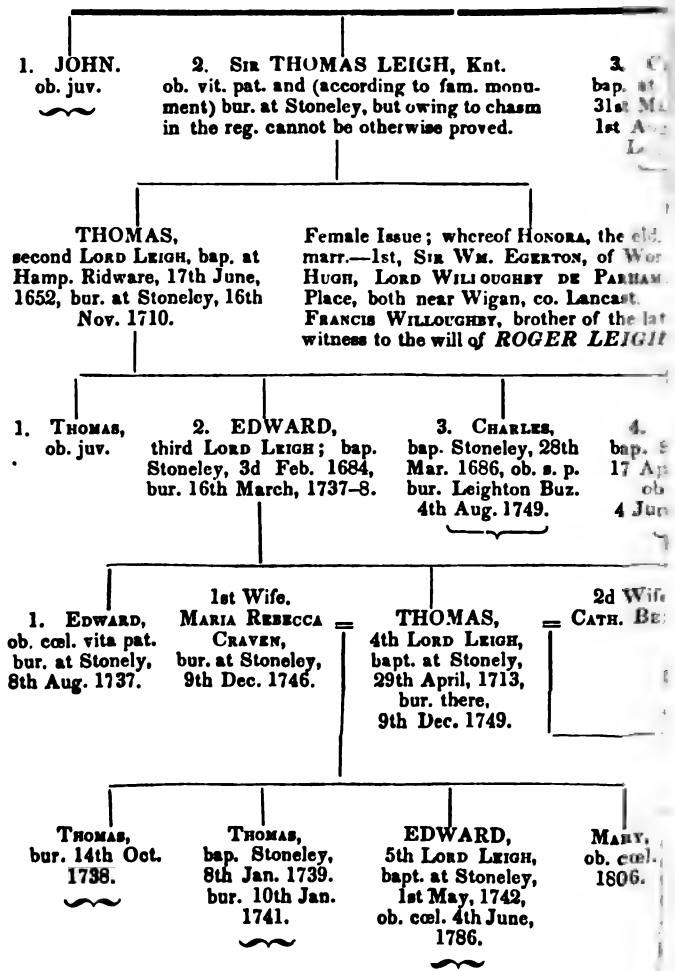
[\*352] sion \*of the said estates, to execute a will, which purports to bear date the 23d December, 1786, devising the said estates as after mentioned: that she, by her said will, after reciting that by the now stating testamentary paper she made her last will and testament, so far only as concerned all the freehold and copyhold estates, late the property of her late brother, Edward Lord Leigh, which descended or came to her at his death, either in possession, remainder, or reversion, and so far as she had, by law or equity, the right or power to devise or dispose of the same, that is to say, she gave and devised all the freehold abbeys, parks, manors, lands, tenements, tithes and hereditaments, and all the copyhold estates late of her said late brother, of which he was seised or entitled in possession or remainder, reversion or expectancy, to Robert Augustus Johnson, esquire, his heirs and assigns, to the use of Joseph Hill, esquire, his executors, administrators or assigns, for the term of one thousand years, to be computed from the day of the decease of the testatrix, but nevertheless in trust for the purposes thereafter declared concerning the said term; and, subject to the said term of one thousand years, to to the use of the said Reverend Thomas Leigh, and his assigns, for life, and from and immediately after his decease to the use of James Leigh Perrot, and his assigns for life; and, from and immediately after the decease of the survivor of them the said Thomas Leigh and James Leigh Perrot, to the use and intent that — Leigh, brother of the said James Leigh Perrot, might receive, out of the rents and profits of the said premises, the yearly rent or sum of

200*l.* during his life, to commence from the death of the survivor of [\*353] the said \*James Leigh and James Leigh Perrot; and, subject as aforesaid, to the use of James Henry Leigh, esquire, and his assigns, for his life; and, from and immediately after the determination of that estate, by forfeiture or otherwise, during the life of the said James Henry Leigh, to the use of Robert Augustus Johnson and his heirs, during the life of the said James Henry Leigh, in trust, to preserve contingent remainders thereafter limited; and, from and immediately after the decease of the said James Henry Leigh, to the use of the first son of the body of the said James Henry Leigh and the heirs male of the body of such first son, and, for want of such issue, to the use of the second, third, and fourth, and all and every other the son and sons of the body of the said James Henry Leigh, successively, as they should be in order of birth, and the heirs male of the body and bodies of such sons successively, with divers remainders over: that, at the time the Reverend Thomas Leigh, James Henry Leigh, and Joseph Hill, procured the honorable Mary Leigh to execute her said will, they knew that the plaintiff was entitled, under the limitations in the testator's will, to the devised premises and estates upon the death of the honorable Mary Leigh, in cases he should die without leaving any issue; and that the said Reverend Thomas Leigh, James Henry Leigh, and Joseph Hill, procured the honorable Mary Leigh to make her said will for the purpose of defrauding the plaintiff of the said devised estates, and and to prevent the plaintiff from establishing his title to the same estates: that



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Sir T.  
created B.  
of Warw.  
1643; 1644.



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; said Mary Leigh died on the 2d of July, 1806, without having been married, and without leaving issue ; and that the said Anne Hackett having died without issue in the lifetime of the honorable Mary Leigh, \*the said [\*354] states devised by the testator's will became, at the death of the honorable Mary Leigh, vested, under and by virtue of the limitations contained in the testator's will, in the person who then answered the description of the first and nearest of the testator's kindred, being male, and of his name and blood :

SIR That the late Sir Thomas Leigh, the first Baron Leigh, and one of the ancestors of the testator, died in the month of February, 1671 ; and that the said Thomas, the first Lord Leigh, had five sons ; John Leigh, his eldest son, Sir Thomas Leigh, Knight, his second son, Charles Leigh, his third son, Christopher Leigh, his fourth son, and Ferdinand Leigh, his fifth son ; that John Leigh, eldest son of the first Lord Leigh, died an infant, and without having been married ; and that Sir Thomas Leigh, the second son, died in the life-time of the said first Lord Leigh, but having left one only son and heir at law, namely, Thomas, who upon the death of his grandfather the first Lord Leigh, in 1671, became the second Lord Leigh : that the said Thomas, the second Lord Leigh, had four sons (that is to say) Thomas Leigh, Edward Leigh, Charles Leigh, and Lewis Leigh ; and that the said Thomas Leigh, Lewis Leigh, and Charles Leigh, died unmarried, and without issue ; that the said Thomas, the second Lord Leigh, died in or about the month of October, 1710, leaving his said son Edward Leigh, who thereupon became the third Lord Leigh ; that the said Edward, third Lord Leigh, had two sons (that is to say) Edward Leigh, who died unmarried and without issue, and Thomas Leigh, who became, on the death of his father, which happened in the month of March, 1737-8, the fourth Lord Leigh : that the said Thomas, fourth Lord Leigh, had three sons (that is to say) Thomas Leigh and Thomas Leigh, \*who both died infants, and without leaving any issue ; and the testator Edward, who became, on the death of his father in the month of November, 1749, the fifth Lord Leigh : that the said testator died unmarried, and without issue, whereupon the issue male of the said Thomas first Lord Leigh, descended from the body of the said Sir Thomas Leigh his second son, became extinct : that Charles Leigh, the third son of Thomas, first Lord Leigh, died in the year 1704, without issue, and that Ferdinand Leigh, the fifth son of the first Lord Leigh, also died unmarried and without issue, in the lifetime of his father, the first Lord Leigh : that Christopher Leigh, the fourth son of the first Lord Leigh, had three sons, (that is to say) Roger Leigh, his first and eldest son ; Ferdinand Leigh and Thomas Leigh ; and that the said Christopher Leigh died in the month of September, 1672 : that the said Roger Leigh, the eldest son of the said Christopher Leigh, had one son, namely, James Leigh, and that the said Roger Leigh died in the year 1702 : that the said James Leigh had issue Robert Leigh, his son and heir at law ; and that the said James Leigh died in the year 1709 : that the said Robert Leigh had issue James Leigh, his son and heir at law ; and that the said Robert Leigh died, in May, 1785 : that the said James

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Leigh had issue the plaintiff; and that the said James Leigh died in the month of May, 1788; and that the plaintiff was the first and nearest of the testator's kindred, being male and of his name and blood, and that was living at the death of the honorable Mary Leigh; and that the plaintiff then became and was entitled to the said devised estates, as tenant in tail thereof, under and by virtue of the testator's will: that the honorable Mary Leigh having devised [\*356] the estates by her will as aforesaid, the Reverend \*Thomas Leigh in her will named, entered into possession of the estates, and received the rents thereof, and continued in such possession for about four years, when the last-named Thomas Leigh delivered up the possession of the devised estates to James Henry Leigh, to whom the honorable Mary Leigh devised the estates for his life as aforesaid; and that James Henry Leigh had ever since been and then was in the possession of the devised estates, or in the receipt of the rents and profits thereof: that the Reverend Thomas Leigh, James Leigh Perrot, and — Leigh his brother, have departed this life; that Joseph Hill, to whom the honorable Mary Leigh devised the said estates for a term of 1000 years, was dead; and that he had made his will, whereof he appointed Hill Mortimer, executor, and who claimed to have an interest in the devised estates, in respect of the term of 1000 years, as Hill's personal representative: that James Henry Leigh was descended from one of the brothers of the grandfather of Thomas the first Lord Leigh: that James Henry Leigh was married, and had issue a son, named Chandos Leigh, who claimed, under the limitations contained in the will of the honorable Mary Leigh, to be entitled to an estate-tail in the estates devised by the testator Edward Lord Leigh, expectant on the death of James Henry Leigh: that James Henry Leigh had, since he had been in possession of the devised estates, received the rents to the amount of 500,000*l.*, and cut down and used a large quantity of timber on the estates; and that he had removed the monument of Christopher Leigh from the church at Stoneleigh, and carried away, concealed or destroyed, divers family memorials, &c. which would have been evidence of the plaintiff's pedigree; [\*357] and that James Henry Leigh had \*in his custody divers deeds, &c., by which it would appear that the plaintiff was entitled to the devised estates: that the plaintiff had not, until very lately, been able to procure evidence of his relationship to the testator, and of his title to the devised estates, by reason of James Henry Leigh destroying and concealing such evidence; and that James Henry Leigh had prevailed upon persons, in whom the legal estate of the term of 500 years was then vested, to make an assignment of the term to or in trust for him; and that the defendants threatened, in case the plaintiff should proceed at law to recover possession of the devised estates comprised in the term, to set up the term of 500 years, in order to defeat the plaintiff from trying his title to the devised estates.

The bill prayed that the defendants might make a discovery of the matters aforesaid; and might be restrained from setting up the term of 500 years; and

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that James Henry Leigh might be also restrained from cutting down any timber trees upon the devised estates.

On the 17th of May, 1821, the defendant, Chandos Leigh, put in a plea to the bill, by which he averred that Edward Lord Leigh was not, and did not claim to be, at the time of his death, seised, or otherwise well entitled in fee, to any freehold abbeys, parks, manors, messuages, farms, lands, tenements or hereditaments, in the counties of Suffolk and Northampton, or either of them, or elsewhere, other than in the counties of Warwick, Leicester, Stafford, Bedford, Buckingham and Chester; that in and prior to the month of November, 1806, the Reverend Thomas Leigh \*was seised in possession [\*358] of the freehold estates or hereditaments after described, situate in the counties of Warwick, Leicester, Stafford, Bedford, Buckingham and Chester, which were the only freehold abbeys, parks, manors, messuages, farms, lands, tenements and hereditaments whereof Edward Lord Leigh was, or claimed to be, seised or well entitled in fee at the time of his death: that the said Thomas Leigh being so seised, he and James Leigh Perrot and the defendant, James Henry Leigh, executed indentures of lease and release, bearing date respectively the 3d and 4th days of November, 1806, the indenture of release being made between the Reverend Thomas Leigh, James Leigh Perrot, and Jane his wife, the defendant James Henry Leigh and the honorable Julia Judith, his wife, of the first part, George Kinderley and William Domville, of the second part, and Joseph Hill and Thomas Graham, of the third part, whereby, after reciting that Mary Leigh had made her will, whereby she gave certain hereditaments therein described to the use of Robert Augustus Johnson, his heirs and assigns, to the use of the said Thomas Leigh and his assigns for his life, with remainder to the use of James Leigh Perrot and his assigns for life, with remainder after the decease of the survivor of Thomas Leigh and James Leigh Perrot, to the intent that Leigh, brother of James Leigh Perrot, might receive, out of the rents, the yearly sum of 200*l.*, and subject thereto to the use of James Henry Leigh and his assigns for his life; with remainder to the use of Robert Augustus Johnson and his heirs, during the life of the said James Henry Leigh, in trust to preserve contingent remainders; with remainder to the use of the first and other sons of James Henry Leigh, successively, in \*tail-male, with divers remainders over, with the ultimate [\*359] remainder or reversion to the use of the heirs male of Mary Leigh: it was witnessed that Thomas Leigh, James Leigh Perrot, and the defendant James Henry Leigh, conveyed to Kinderley and Domville, and their heirs, all the manors and other hereditaments situate in the six last-mentioned counties, which were formerly the estate of freehold and inheritance of Edward Lord Leigh, deceased, and since of Mary Leigh, or whereof or wherein Thomas Leigh and James Leigh Perrot and the defendant James Henry Leigh, had any estate of freehold and inheritance in possession, reversion, remainder or expectancy, under the therein-recited wills, or either of them: and they covenanted to levy, to Kinderley and Domville, six fines *sur conuzance de droit*

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*come ceo*, &c. with proclamations of such of the hereditaments comprised in the indenture of release as were freehold of inheritance, to the intent that Kinderley and Domville might become tenants of the freehold and inheritance of the same hereditaments, in order that six common recoveries might be thereof suffered, in which recoveries Thomas Leigh, James Leigh Perrot, and the defendant James Henry Leigh, were to be vouched, and were to vouch over the vouchees : and it was declared that the indenture of release, recoveries and fines, should enure to such uses, upon and for such trusts, intents and purposes, and with, under and subject to such powers, provisoes, declarations and conditions as were expressed and declared concerning the same by the therein-recited will of Mary Leigh, and for the purpose of confirming the devises and limitations, contained in that will, concerning the freehold estates thereof [\*360] by devised. The plea further averred that in 47th Geo. 3. the \*fines were levied accordingly ; and that in the same year five common recoveries were suffered, as agreed by the indenture of release, of such of the hereditaments as were situate in the counties of Warwick, Leicester, Stafford, Bedford and Buckingham : and that prior to July, 1812, the defendant, James Henry Leigh, purchased from James Leigh Perrot all the interest of the said James Leigh Perrot in the said hereditaments comprised in the indentures of lease and release ; and that James Leigh Perrot duly conveyed to the defendant James Henry Leigh all his interest in the said hereditaments and premises accordingly : that the defendant Chandos Leigh attained his age of twenty-one years prior to the month of July, 1812 ; and that by indentures of lease and release, dated the 30th and 31st of July, 1812, the release being made between the said Thomas Leigh, the defendant James Henry Leigh, and the defendant Chandos Leigh, of the first part ; Kinderley and Domville, of the second part ; and Thomas Graham and William Bentham, of the third part ; the parties of the first part conveyed, to the parties of the second part and their heirs, such parts of the said hereditaments as were situate in the county of Chester, to make them tenants to the freehold and inheritance of the same premises, in order that a common recovery might be thereof suffered in the court of common pleas at Chester, which should enure to such uses as Thomas Leigh, the defendant, James Henry Leigh, and the defendant Chandos Leigh, should in manner therein mentioned appoint, and, in default thereof, to the use of Thomas Leigh for life, with remainder to such uses as the defendant, James Henry Leigh, and the defendant, Chandos Leigh, should in manner [\*361] therein mentioned appoint ; and in default \*thereof, to the use of the defendant, James Henry Leigh for life, and, after his decease, to such uses as the defendant, Chandos Leigh, after the deaths of Thomas Leigh and the defendant James Henry Leigh should in manner therein mentioned appoint, and in the mean time to the use of the defendant Chandos Leigh, in tail general, with remainder to the use of the right heirs of the defendant, James Henry Leigh : that a common recovery was suffered in pursuance of the last mentioned indenture : that, for further perfecting the title of Thomas Leigh

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and the defendants, James Henry Leigh and Chandos Leigh, to the said hereditaments (amongst others) indentures of lease and release, dated the 4th and 5th days of November, 1812, made between the Reverend Thomas Leigh, of the first part, the defendant, James Henry Leigh, of the second part, the defendant, Chandos Leigh, therein described as being (as he averred in fact he was) the only son and heir apparent of the defendant James Henry Leigh, of the third part, Kinderley and Domville, of the fourth part, Graham and Ben-  
 tham, of the fifth part, and George Talbot, the Reverend Theophilus Leigh Cook, and Edward Hyde East, Esq., of the sixth part, it was witnessed that Thomas Leigh, the defendant, James Henry Leigh, and the defendant Chandos Leigh, and by their direction, Thomas Graham, conveyed to Kinderley and Domville the hereditaments and premises in the counties of Warwick, Leices-  
 ter, Stafford, Bedford and Buckingham, to make them tenants of the freehold and inheritance of the same, in order that five common recoveries thereof might be had : and by the same indenture, Thomas Leigh, the defendant James Henry Leigh, and the defendant Chandos Leigh, appointed that the hereditaments in the county of Chester, comprised \*in the [\*362] indentures of the 80th and 31st of July, 1812, and the recovery, should enure to the uses and trusts in the indenture of the 5th November, 1812, mentioned : and it was thereby declared that after the suffering of the common recoveries as well as the last-mentioned indenture, as the recoveries and all other fines and assurances had or to be had of the same hereditaments, should enure, and also that as well the indentures of the 80th and 31st of July, 1812, and the recovery suffered in pursuance thereof of the hereditaments in the county of Chester, as also the aforesaid appointment of the same premises, and all fines, conveyances and assurances whatsoever, theretofore had or there-  
 after to be had, of the same hereditaments, should enure to such uses and es-  
 tates as Thomas Leigh, the defendant James Henry Leigh, and the defendant Chandos Leigh, should jointly appoint ; and in default thereof, to the use of Thomas Leigh for his life ; with remainder to such uses as the defendants James Henry Leigh, and Chandos Leigh, after the death of Thomas Leigh, should in manner in the same indenture mentioned jointly appoint ; and in the mean time to the use of the defendant James Henry Leigh for life ; with re-  
 mainder to the use of Kinderley and Domville and their heirs, during the life of the defendant James Henry Leigh, upon trust, to preserve contingent re-  
 mainders ; and after the decease of the survivor of Thomas Leigh, and the de-  
 fendant James Henry Leigh, to such uses as the defendant Chandos Leigh, in case of his surviving Thomas Leigh and James Henry Leigh, should, in man-  
 ner in the same indenture mentioned, appoint ; with remainder to the use of the defendant Chandos Leigh, in tail male ; with remainder to the use of the second and other \*sons of the defendant Chandos Leigh succes- [\*363]  
 sively in tail male, with remainder to the use of his daughters succes-  
 sively in tail male ; with remainder to the use of such one or more of the daughters of the defendant James Henry Leigh, as he should appoint ; and in



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default of appointment, to the use of the first and other daughters of the defendant James Henry Leigh, in tail general ; with remainder to the use of the defendant Chandos Leigh and his heirs. The plea further averred that in pursuance of the last-mentioned indenture of release, five recoveries were suffered, in Michaelmas term, 1813, of the hereditaments situate in the counties of Warwick, Leicester, Stafford, Bedford, and Buckingham, in which Thomas Leigh and the defendant James Henry Leigh, and the defendant Chandos Leigh, were vouched over the common vouchees : that Thomas Leigh died in the year 1813 ; and that by force of the said fine, with proclamations and other assurances, James Henry Leigh had, ever since the death of Thomas Leigh, been and then was seised in possession of the hereditaments in the counties of Warwick, Leicester, Stafford, Bedford, Buckingham and Chester : that, to the best of his, the defendant Chandos Leigh's, belief, the plaintiff was at the time the said fines were levied of the age of twenty-one years, and *compos mentis*, and at large, and out of prison, and within the four seas ; and that the plaintiff did not, within five years of the proclamations made upon the said fines respectively, and which were duly had and made according to the forms of the statutes in those cases made, or at any time after, otherwise than by his bill, and which was filed on or about the 13th of October, 1820, prosecute any

claim to the said premises, or any part thereof, by action or otherwise ; [\*364] so that the plaintiff \*was barred of all claim to the said premises, by

force of the fines with proclamations thereupon and non-claims as aforesaid, as also by force and virtue of the several other conveyances and assurances before mentioned ; wherefore the defendant pleaded the several matters before mentioned in bar to so much of the bill as sought relief or discovery in respect of the freehold lands and hereditaments in the bill mentioned, other than freehold lands in the counties of Suffolk and Northampton. And, as to so much of the bill as prayed relief or discovery in respect of any copyhold tenements, the defendant pleaded in bar thereto, and averred that Edward Lord Leigh at the time of his death did not claim, and was not seised of, or otherwise well entitled to, any copyhold tenements, which he had surrendered to the use of his will : and as to so much of the bill as prayed any relief or discovery in respect of any real estate, not being freehold or copyhold, the defendant pleaded in bar thereto, and averred that Edward Lord Leigh, at the time of his death, did not claim, and was seised of, or otherwise well entitled, in fee, to any real estate not being freehold or copyhold.

Mr. *Horne*, Mr. *Shadwell*, and Mr. *Koe*, in support of the plea :—The question between the parties is entirely a legal one, except as to the right to remove the outstanding term. The defence is a fine with proclamations, as a bar to the title of the plaintiff ? and it cannot be denied that a fine with proclamations must, in all cases, be a complete and absolute bar to all legal title that the plaintiff can assert ; and, therefore, to any species of relief that this court can give. If the legal title is gone, this court will not remove a term.

[\*365] Lord Redesdale says : “ A plea of a fine and non-claim, though a

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legal bar, is equally good in equity, provided it is pleaded with proper averments.”(a)

The VICE-CHANCELLOR :—As at present advised, I am of opinion that this plea cannot be supported. This bill is filed by a person claiming title at law to the estates of the late Lord Leigh. Lord Leigh, by his will, created a term of 500 years, for the purpose of raising money for payment of his debts, legacies, &c. ; and, subject to that term, made legal limitations of his estates, which we may consider as determined, unless the plaintiff is entitled under one of them. Sufficient is stated in the bill to show that the plaintiff has a color of title to the estates. The plaintiff states that the term is satisfied, and accounts for the extinction of all the intermediate limitations ; and he also states that he is desirous of trying his title at law, but that, by reason of the outstanding term, he is unable to go to trial. It is a clear principle that, if there is a term prior to legal limitations, and the purposes of the term are satisfied, the termor is a trustee for the person who under the legal limitations is entitled to the estate. Now the plaintiff asks no relief, except that the termor shall not be permitted to interpose the term to prevent the trial of the legal question, whether, under the limitations of the will, the plaintiff is entitled to the estates. The defendant in this case has pleaded fines and recoveries and possession under them for a sufficient time to bar the plaintiff’s claim. Now, if the fines and recoveries have produced the intended effect, the termor is a trustee for the defendant ; but if not, a court of equity is \*bound to say to the termor [\*366] that, as between two persons claiming an estate by a legal title, he shall stand neuter. The bill asks no other relief than to prevent the assignee of the term, who is, as it were, a stakeholder, from interposing to prevent the trial of the real right. The defendant at the trial of the ejectment may plead the fines and non-claim. But a termor is always a trustee for the real owner of the estate ; and a court of equity will always prevent him from setting up the term. If the bill had prayed for delivery of possession, an account of rents and profits, or any other species of equitable relief, I should have considered whether the plea contained a sufficient legal defence.

*Argument for the defendant continued* :—Those who set up the fine and non-claim have got a good title against all the world except those who claim under the term. But your honor’s observations would make it impossible for a person who had levied a fine to avail himself of it in any case where there is a term. The creation of this term is referred to a person who was, or claimed to be, seised in fee. It amounts only to an allegation that there was or was not a term. Besides, the bill states that the term has been assigned to James Henry Leigh ; now, as he is seised of the freehold, the term is merged, and therefore no such term now exists. [The Vice-Chancellor :—If that be so, you cannot be prejudiced by having the term removed.]—A plea of the statute of limitations has been allowed to a bill for discovery, and to prevent the setting

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up of outstanding terms, on the ground that the statute was a good defence at law. *Jermyn v. Best*.(b) And, on the same principle, pleas of other [\*367] matters have been allowed to bills of \*discovery, *Sutton v. Earl of Scarborough*,(c) *Baillie v. Sibbald*,(d) *Mendizabel v. Machado*,(e) and *Gait v. Osbaldeston*.(f)

Mr. Sugden, and Mr. Treslove, for the plaintiff:—Where a bill is filed for discovery and not for relief, the defendant cannot plead matter which would be a good defence at law. *Hindman v. Taylor*(g) decides the very point. If, where the plaintiff in a bill of discovery states that he is trying to establish his title before another court, which is the proper tribunal for deciding upon his claims, a court of equity were to allow the defendant to plead matter which would be a good defence at law, it would then have to determine as to the sufficiency of the legal defence, and would take upon itself the decision of a legal question. If the court were to allow this plea, it would have to enter into the discussion of the operation of these fines; and it would not decide upon the subject without taking the opinion of a court of law; and would thus do indirectly, what the plaintiff seeks in the first instance.

Mr. Koe, in reply:—The case of *Hindman v. Taylor* has been overruled by *Mendizabel v. Machado*. The Lord Chancellor's decision in *Gait v. Osbaldeston* is peculiarly applicable to the present case.

The VICE-CHANCELLOR:—The case, stripped of technicalities, is [\*368] this: Lord Leigh, being seised in possession of estates in various \*counties, devised them to trustees for a term of years for repayment of his debts and other purposes, which have been all satisfied; and, subject to the term, he gave those estates to certain individuals for their lives, and to their issue male, after their deaths; and, on failure of those limitations, to the person who should answer the description of the first and nearest of his kindred, being male, and of his name and blood. The plaintiff alleges that all the prior limitations are spent; and that he is the person who answers this description, and is therefore now entitled to the estates: and all the relief he asks is, that he may not be prevented, by any use that may be made of the term, from asserting his title at law; and he therefore prays that the defendant may be restrained from setting up the term in bar of any action of ejectment that he may bring.

I had apprehended that it was one of the principles of a court of equity that, wherever the owner of an estate creates a term for particular purposes and limits his estate in a series of devises to certain individuals, whoever is possessed of the term after the purposes are answered is a trustee for those who are then entitled to the estate so devised: and that, whether A. or B. is entitled, the termor is a stakeholder between the two; and, when it is decided which of the two is entitled, the termor is a trustee for the person in whom the court of law has determined that the estate is vested,

(b) See post, 373.

(c) 9 Ves. 71.

(d) 15 Ves. 185.

(e) Ante, 68.

(f) 5 Madd. 428, overruled on appeal by Lord Eldon, C. 1 Russ. 158.

(g) 2 Bro. C. C. 7.

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Upon the present record it must be taken as true that the plaintiff is the person who, under the limitations of this will, is entitled to recover at law; and that the defendant is in possession adversely to the plaintiff, and seeks to protect his possession by means of the term. The defendant, having admitted these facts. \*sets up this defence; that, being in possession of [\*369] the estates, he had levied fines of them; that the five year's non-claim had run; and that the plaintiff, at the time when the fines were levied, was under no legal disability, and, consequently that the defendant has acquired a new and distinct title, which enables him to defeat the plaintiff at law, and to call upon the court of equity to decide whether it ought to give the plaintiff any relief with a view to assist him to try his title at law. This is a singular mode of dealing with the jurisdiction of a court of equity; for, if the court were to take cognizance of the question, whether these fines and non-claim are, or are not a bar, the consequence would be, if on argument it appeared that they are vicious and no bar, that the plaintiff, on the plea being overruled, would have to go again into a court of law, and to try the question a second time. But, if the plaintiff took issue on the plea, many facts might be proved to nullify the plea. The plaintiff might be able to show, by extrinsic matter, that the plea was good for nothing, as, for instance, by proving that there had been an entry within the five years; that the plaintiff was under age when the fines were levied; that there had been fraud in levying them, or that there were no proper tenants to the *præcipe* when the recoveries were suffered: and having proved all these facts in a court of equity, that court would have only to turn the plaintiff back to reargue all these questions in a court of law, where they must ultimately be decided. I had long impressed my mind with a notion that, to this species of bill, this defence could not be set up; but it does not follow that no defence will hold. I am surprised to find that there is so little of positive authority upon the subject. Lord Redesdale says:

"courts of equity, in many cases, will \*act as ancillary to the adminis- [\*370] tration of justice in other courts, by removing impediments to the fair decision of a question. Thus if an ejectment is brought to try a right to land in a court of common law, a court of equity will restrain the party in possession from setting up any title which may prevent the fair trial of the right, as a term for years, or other interest in a trustee, lessee, or mortgagee."(a)

It was said, in the argument, that if this plea were not allowed, there would be no case in which such a defence could be set up. Now Lord Redesdale states cases in which this defence would be available; for he goes on to say: "But this will not be done in every case; for as the court proceeds upon the principle that the party in possession ought not, in conscience, to use an accidental advantage to protect his possession against a real right in his adversary, if there is any circumstance which meets the reasoning upon this principle the court will not interfere. Therefore, if the possessor is a purchaser for a val-

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uable consideration, without notice of the title of the claimant, this is a title, in conscience, equal to that of the claimant, and the court will not restrain the possessor from using any advantage he may be able to gain to defend his possession. It can hardly appear, upon the face of a bill, that the defendant is in such a situation, and therefore the benefit of this defence must generally be taken by plea : but if the case should be so stated, the defendant might demur ; because the case stated would appear to be such in which a court of equity ought not to assume jurisdiction.”(b)

[\*371] \*There is another part of this treatise which, by inference, affirms the proposition which I have laid down. In speaking of what pleas may be put in to bills, the author says : “ If the judgment of a court of ordinary jurisdiction has finally determined the rights of the parties, the judgment may, in general, be pleaded in bar of a bill in equity. Thus, where a bill was brought by a person claiming to be son and heir of Joscelin Earl of Leicester, and alleged that the Earl, being tenant in tail of estates, had suffered a recovery, and had declared the use to himself and a trustee in fee ; and that the plaintiff had brought a writ of right to recover the lands, but the defendant had possession of the title-deeds, and intended to set up the legal estate which was vested in the trustee ; and prayed a discovery of the deeds, and that the defendant might be restrained from setting up the estate in the trustee ; the defendant pleaded, as to the discovery of the deeds and relief, judgment in her favor in the writ of right ; and averred that the title in the trustee, which the bill sought to have removed, had not been given in evidence ; and the plea was allowed.”(c)

The meaning of Lord Redesdale is, that, if the party whose title to an estate is disputed has conveyed the property to himself and a trustee, and the legal estate is, by survivorship, in the trustee, the court would prevent that estate from being set up in bar of the action. He then goes to show that the interposition of the court was unnecessary in the case cited, as the writ of right had been tried, and the estate not set up. These passages are all that I can find upon the subject.

[\*372] \*There, is a case not reported, which came first before Sir. W. Grant, and afterwards before Lord Eldon ; I mean *Allen v. Gwynne*. The bill was filed by, Allen, who represented himself to be entitled by descent to an estate of which the defendant was in possession by means of a will fraudulently obtained from the plaintiff's ancestor : and it charged fraud and misconduct in those who procured the will, and also that they had by means equally fraudulent procured a deed which disinherited the plaintiff, and that the person in possession had levied a fine : and the bill prayed that the defendants might be restrained from setting up the fine. In that bill the peculiarity was, that it did not aver that there was any outstanding term ; but, after praying for the relief, a few words were added, praying that the defendants might be re-

(b) *Ibid*.(c) *Treat. Plead.* 206.

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 1819.—*Jermy v. Best.*


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strained from setting up any out-standing terms. The defendants, in their answer insisted on the fine and non-claim as a bar. The case came before Sir W. Grant. I was counsel for the plaintiff, and, in the result, obtained this decree, that the case should stand for a twelve-month, with permission to the plaintiff to bring an ejectment to try his title at law, and the defendants were not to set up any outstanding terms. I think that Sir Samuel Romilly did not object to the form of the record, as to the outstanding terms and probably he thought a trial at law, at once, most beneficial to his client. Sir W. Grant, however, would not interfere to prevent the defendant from availing himself of the fine at law. This is, substantially, a decision in the present case; for there was in that case what was, in substance, a plea of a fine and non-claim. The plaintiff in that case afterwards appealed to Lord Eldon; and I supported \*the appeal unsuccessfully. This is all the [\*373] authority I have been able to find upon the question.

My opinion is, that this peculiar species of bill does not admit of this peculiar species of defence by plea. It is on this ground that I overrule the plea.[1]

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 JERMY v. BEST.(\*)

1819; 5th May.—*Pleading.—Statute of limitations.*

The statute of limitations may be pleaded in bar to a bill to prevent the setting up of outstanding terms.

THE bill prayed that the defendants, who were in possession of certain estates in Norfolk. to which the plaintiff claimed to have become entitled by the vesting in possession of the ultimate remainder created by the will of the late William Jermy, Esq. might be restrained from setting up an old out-standing term to defeat the plaintiff in an action of ejectment, which he alleged he intended to bring against them, to recover possession of the estates. The defendants pleaded the statute of limitations, and averred that the right or title of the plaintiff to the lands and hereditaments in the bill mentioned, accrued, if at any time, above twenty years before the plaintiff commenced the proceeding at law in the bill mentioned, for the recovery of the possession of the lands and hereditaments, and before the plaintiff exhibited his bill of complaint; and that the plaintiff had not, nor had any person for him, or in his name, made any entry or claim upon the lands and hereditaments within twenty years after the time when the plaintiff's title was alleged to have accrued, and \*within one year next before any such action or suit as aforesaid was [\*374] commenced or instituted, and prosecuted with effect by the plaintiff according to the statute in that behalf made and provided; and that the plaintiff

(\*) By the kindness of Mr. Blenman the reporter has been furnished with the above note of this case, which is cited ante, 366.

[1] Vide *Goleborn v. Alcock*, Sim. 552.

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was not, at the time when his right of entry upon the lands and hereditaments was alleged to have first accrued, within the age of twenty-one years, *non compos mentis*, imprisoned, or beyond the seas.

Mr. *Pemberton*, in support of the bill, stated the question to be, first, whether the statute of limitations could be pleaded at all in such a case as the present; secondly, whether it was in this case pleaded with proper averments.

The statute cannot be pleaded in this case, because the question of title between the parties is one which ought properly to be tried at law, and the statute would be a good defence at law. The effect therefore of allowing the plea, would be unnecessarily to withdraw the subject of contention between the parties from the proper jurisdiction. And as the validity of the plea, as a bar to the suit, depends upon the matters of fact, such as the non-entry within twenty years, and what regards the disability of the plaintiff, the court may ultimately have to direct an issue upon one or more of those questions of fact; in other words, it would be to be tried at law, whether the plaintiff was to be at liberty to proceed in his action. So that there may be ultimately two trials at law, the first to try the truth of the plea, and if the plea be disproved, the trial of the ejectment.

Secondly, as to the form of the plea: it is not averred that there has [\*375] been an adverse possession against the plaintiff; and this is the very substance of such a plea; and every thing necessary to make the plea a complete distinct defence ought to be distinctly averred.

The averment: "that neither the plaintiff, nor any person for him has entered within twenty years after the time when the plaintiff's title is alleged to have accrued" is defective, because it puts in issue, not the time when plaintiff's title accrued, but the time when it is alleged to have accrued, which is an immaterial issue.

The VICE-CHANCELLOR: (a) — The plaintiff seeks by his bill the assistance of this court in order to enable him to assert a legal title. The only ground for equitable relief is, that he may proceed at law with effect.[1] But if it is clear that, when he has obtained the equitable relief which he seeks, he will nevertheless be unable to proceed at law, the only ground for equitable relief fails.

This is not like the case of *Hindman and Taylor*, (b) which was only a bill of discovery; to which it was there held, you cannot plead the statute of limitations. This is a bill for relief, to which the principle of that case does not apply.[2] The plea in this case does the proper office of a plea, by bringing forward fresh matter, which, if true, is a bar to the plaintiff's equity.[3]

(a) Sir J. Leach.

(b) 2 Bro. C. C. 7.

[1] A plea of no legal title is not a defence to a bill praying discovery in aid of an alleged legal title. *Gait v. Osbaldeston*, 1 Russ. 158.

[2] Where on a bill for discovery, in aid of an action of ejectment, there appears an adverse possession for more than twenty years, not accounted for by any disability, a demurrer will lie. *Marquis of Cholmondely v. Lord Clinton*, Turn. & Russ. 107. S. C. 2 Merr. 171. 2 Jac. & Walk. 1.

[3] Vide *Bogardus v. Trinity Church*, 4 Paige, 178. *Denys v. Locock*, 3 Myl. & Cr. 234.

1827.—*Bevan v. Lewis. Stokes v. Whittaker.*

With regard to the objections of form, it is not necessary that the plea should aver that the plaintiff has \*been out of possession; be- [\*376] cause the bill admits it. The plea is not an independent record, but must be looked at with reference to the bill; when, therefore, the plea avers that no entry has been made within twenty years after the time when the title is alleged to have accrued, I must look to the bill to see when it is there alleged to have accrued, which I find to be at the time of the death of the last tenant for life, this therefore brings it to the time when the plaintiff's title did accrue, if at all.

The plea must be allowed.[1]

Reg. Lib. A. 1818, fol. 951.

BEVAN v. LEWIS. STOKES v. WHITTAKER.

1827; 8th May.—*Partnership.—Commission of bankrupt.—Practice.*

If a partner borrows a sum of money, and gives his own security only for it, it does not become a partnership debt by being applied for partnership purposes, with the knowledge of the other partner.

No objection can be taken to the validity of a commission of bankrupt, unless the requisite notice be given, although the objection appears upon the proceedings, and requires no evidence to support it.

A defendant in a suit by the assignees of a bankrupt can not object to the bill as not having been filed with the consent of the creditors, unless the objection is made by the answer.

THE bill stated that, by the articles of partnership between the plaintiff Bevan and the defendant Lewis, dated the 29th of March, 1823, they agreed to become partners, as linen-draper, for six years, from the 29th of March, then next that the trade should be carried on at Lewis' shop in Holborn: that, for the purpose of forming a capital for carrying on the business, Lewis should bring into the partnership 500*l.*, including what he had expended in purchasing the premises and fitting up the shop: that neither of the partners should, \*without the consent of the other, draw or accept any bill of exchange, [\*377] or promissory note, or contract any debt on account of the partnership, except in the regular course of business, or assign over his share of the partnership effects, or become bail or security for any person, or do any act by which the partnership effects might be seized or taken in execution: that, if either of the parties should act contrary to the articles, the other should be at liberty to dissolve the partnership, by giving notice in writing to the offending partner; and that, at the expiration or other sooner determination of the partnership, the partnership debts should be paid, the capital of the partners

[1] Vide *Mendisabel v. Machado*, ante, 68. *Leigh v. Leigh*, ante, 349. As to the manner of pleading adverse possession, and when it must be accompanied by an answer, *Hardman v. Elmes*, 5 Sim. 640.



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 1827.—*Bean v. Lewis. Stokes v. Whittaker.*


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repaid with interest, and the clear surplus of the moneys belonging to the partnership, be equally divided between the partners. The bill further stated that the partnership was entered upon pursuant to the provisions of this indenture ; that Lewis, unknown to the plaintiff, executed a warrant of attorney, dated the 24th of December, 1822, to confess judgment against him, Lewis, in K. B. at the suit of the defendant Siely, for 500*l.* and interest : that since the formation of the partnership, Lewis, contrary to the articles, had executed a warrant of attorney, dated the 9th of August, 1823, to confess judgment against him in the same court, at the suit of the defendants Siely and Cubitt, for 500*l.* and interest : that judgments had been entered up on these warrants of attorney, and writs of *fi. fa.* sued out upon them : that the defendants, Whittaker and Laurie, the sheriff of Middlesex had, by virtue of the writs, entered upon the partnership premises, and seized a considerable part of the stock and effects, and had proceeded to sell some part thereof, and intended to

sell the remainder, and to seize the other parts of the partnership property, \*and to sell the same, and to pay over the proceeds to Siely and

[\*378] Cubitt to the injury of the joint creditors of the partnership : that partnership property having been taken in execution as aforesaid, the plaintiff had given Lewis notice in writing, declaring the partnership to be dissolved : that Lewis was largely indebted to the plaintiff : that the stock and effects of the partnership ought to be sold, the proceeds applied in payment of the partnership debts, and the surplus divided between the plaintiff and Lewis : that Siely and Cubitt were not entitled, under the executions, to seize the stock and effects, nor had they any interest therein, except in Lewis' share of the surplus aforesaid. The bill prayed for the usual partnership accounts : that the stock and effects might be sold, and the produce applied in payment of the debts of the partnership : that the plaintiff's share of the surplus might be paid to him : that Siely and Cubitt and the sheriff might be restrained from proceeding in the executions, and selling the stock and effects, and paying over the proceeds of the part already sold to Siely and Cubitt : that a receiver might be appointed ; and that the sheriff might be ordered to pay over to him the money collected under the executions, and to deliver to him the stock and effects which had been seized and remained unsold.

The supplemental bill stated that the partnership property had, by accounts which had been taken, been found deficient to answer the debts, by 2,000 and upwards : that, on the 27th of August then last, a commission of bankrupt had been issued against Lewis and Bevan, under which they had been declared bankrupts, and the plaintiffs appointed their assignees. It prayed

[\*379] \*that the proceeds of the stock and effects, which had been sold by the sheriff, might be paid to the plaintiffs, the assignees, for the purpose of their being applied to the payment of the joint debts of the copartnership.

The defendants Siely and Cubitt, in their answer to the original and supplemental bills, said that the first-mentioned sum of 500*l.* was lent by Siely to

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Lewis on the 24th of December, 1824: and that part thereof, amounting to 350*l.* was applied by Lewis in the purchase of the lease of the premises upon which Lewis was then about to carry on the business of a linen-draper and upon which he and Bevan afterwards carried on the same business in partnership; but that the lease was taken in Lewis' name only: that Bevan advanced no part of the capital of the partnership: that he had become, and was well aware of Lewis' having borrowed the 500*l.* of Siely, and given the promissory note and warrant of attorney for securing it: that he also knew how Lewis had applied the 500*l.* or at least 350*l.* part thereof; that Lewis and Bevan having occasion for an advance of money, Lewis, at the request and instance of Bevan, as the defendants had been informed and believed, and with his express authority to give any security for the re-payment thereof that might be required, applied to the defendants Siely and Cubitt for the loan of the further sum of 500*l.* and in consequence of such application the defendants advanced and lent that sum, upon Lewis giving a promissory note, dated the 9th of August, 1823, and a warrant of attorney as a collateral security: that Lewis executed the note and warrant of attorney with the privity and approbation, as the defendants had been \*informed and believed, of Bevan, [\*380] who previously knew that it was Lewis' intention to execute the same, and that the 500*l.* was to be applied for the partnership purposes, and for the joint use and benefit of Bevan and Lewis: that the 500*l.* was, by Bevan's directions, paid to the bankers of the partnership, to the joint credit of the partners, and was afterwards applied by them in paying the debts of the partnership: that the defendants had been informed and believed that, at the date of the commission, and during the partnership, Bevan had no property therein: that the property had been seized under the executions before any act of bankruptcy had been committed by Bevan and Lewis, or either of them: that, as the defendants believed, the partnership was considerably indebted to Lewis, and not Lewis to the partnership: that the defendants were unable to set forth whether the partnership effects were insufficient to pay the debts; and that they did not admit the validity of the commission, or any of the requisites to sustain the same.

The answers were replied to, but no evidence was gone into on either side; and the cause now came on to be heard.

After the pleadings had been opened, Mr. *Heald*, with whom was Mr. *Rose*, for the defendants Siely and Cubitt, objected that the supplemental bill had been filed by the assignees without the consent of the creditors, and referred to *Ockleston v. Benson*. (a) But the Vice-Chancellor said that as the objection was not raised by the answer, he could not regard it.

\*Mr. *Horne*, and Mr. *Theobald*, for the plaintiffs:—The question is, [\*381] whether the property, which has been taken under the executions, belongs to the parties who issued the writs, or to the assignees. It is clear that the pro-

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perty that was seized belonged to the partnership and that the debts for which it was seized were the separate debts of one of the partners. The securities were executed, the judgments entered up, and the executions issued against Lewis only. If the defendants have no lien on this property, it is their own fault, as they might have had the warrants of attorney executed by both partners which they omitted to have done. The utmost that the defendants can be entitled to, is Lewis' share of the surplus, if there shall be any, after all the demands on the partnership are satisfied.(b)

Mr. *Heald*, and Mr. *Rose*, for the defendants *Siely* and *Cubitt* :—If the debts for which the securities were given had been the separate debts of Lewis, no answer could be given to the arguments for the plaintiffs. But they were the joint debts of both partners, notwithstanding the securities were executed by Lewis alone; for both the sums were used for partnership purposes with *Bevan's* privity and consent, and one of them was even borrowed, with his knowledge, for those purposes. These sums, therefore, by the use that was made of them, became joint debts.

Mr. *Phillimore*, for the defendants, *Laurie* and *Whittaker*, the sheriff of *Middlesex*.

[\*382] \*The VICE-CHANCELLOR :—The judgments that have been entered up upon the securities for the sums in question, must take their character from the securities on which they have been so entered up; and, as those securities were executed by one only of the partners, they constitute the creditors joint proprietors only with the other partners. The accounts of the partnership estate and debts must therefore be taken in the manner prayed by the bill; and the defendants will be entitled to be paid their debts out of Lewis' share of any surplus that remains after all demands on the partnership are satisfied.

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In the course of the argument in this case, Mr. *Rose*, to whom the proceedings under the commission of bankrupt had been handed by the solicitor to the plaintiffs, the assignees, was proceeding to contend that the act of bankruptcy on which the commission had been issued, appeared, on the face of the proceedings, not to be a sufficient one; and that therefore the commission was invalid; and he said that by the 92d sec. of the New Bankrupt Act,(c)

(b) See *Taylor v. Fields*, 4 Ves. 396, and *Campbell v. Mullett*, 2 Swanst. 551, and the cases mentioned in the notes on that case.

(c) 6 Geo. 4 c. 16. The sections here referred to are as follows: sect. 90. And be it enacted, that in any action by or against any assignee, or in any action against any commissioner or person acting under the warrant of the commissioners, for any thing done as such commissioner, or under such warrant, no proof shall be required, at the trial, of the petitioning creditor's debt or debts, or of the trading, or act or acts of bankruptcy respectively, unless the other party in such action shall, if defendant, at or before pleading, and, if plaintiff, before issue joined, give notice in writing to such assignee, commissioner, or other person, that he intends to dispute some, and which of such matters; and, in case such notice shall have been given, if such assignee, commissioner, or other person shall prove the matters so disputed, or the other party admit the same, the judge before whom the cause shall be tried, may, (if he thinks fit,) grant a certificate of such proof or admission;

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the depositions taken before the \*commissioner were not conclusive, [\*383] but only were evidence of the matters therein contained; and that therefore, where the objection to the validity of the commission \*ap- [\*384] peared on the proceedings, as it did not require evidence to support it,

and such assignee, commissioner, or other person, shall be entitled to the costs, to be taxed by the proper officer, occasioned by such notice, and such costs shall, if such assignee, commissioner, or other person shall obtain a verdict, be added to the costs; and if the other party shall obtain a verdict, shall be deducted from the costs which such other party would otherwise be entitled to receive from such assignee, commissioner, or other person.

Sect. 91. And be it enacted that, in all suits in equity by or against the assignees, no proof shall be required, at the hearing, of the petitioning creditor's debt or debts, or of the trading, or act or acts of bankruptcy respectively, as against any of the parties in such suit, except such parties as shall, within ten days after rejoinder, give notice in writing to the assignees, of his or their intention to dispute some and which of such matters; and where such notice shall have been given, if the assignees shall prove the matter so disputed, the costs occasioned by such notice, to be taxed by the proper officer, shall, if the court see fit, be paid by the party or parties so giving such notice as aforesaid, and the service of such notice may be proved by affidavit upon hearing of the cause.

Sect. 92. And be it enacted that, if the bankrupt shall not, (if he was within the United Kingdom at the issuing of the commission) within two calendar months after the adjudication, or (if he was out of the United Kingdom) within twelve calendar months after the adjudication, having given notice of his intention to dispute the commission, and have proceeded therein with due diligence, the depositions taken before the commissioners at the time of, or previous to, the adjudication of the petitioning creditor's debt or debts, and of the trading and act or acts of bankruptcy, shall be conclusive evidence of the matters therein respectively contained, in all actions at law or suits in equity brought by the assignees for any debt or demand for which the bankrupt might have sustained any action or suit.

The sections of the 49th Geo. 3, c. 121, which relate to the same subject, are as follows;—Sect. 10. And be it enacted, by the authority aforesaid, that, from and after the passing of this act, in any action now brought or hereafter to be brought by or against any assignee of any bankrupt, the commission of bankrupt, and the proceedings of the commissioners under the same, shall be evidence to be received of the petitioning creditor's debt, and of the trading and bankruptcy of such bankrupt, unless the other party in such action shall, if defendant, at or before the time of his pleading to such action, and, if plaintiff, before issue joined in such action, give notice in writing to such assignee that he intends to dispute such matters or any of them; and where such notice shall have been given, if such assignee shall at the trial prove the matter so disputed, or the other party shall at the trial admit the same, if he shall see fit, grant a certificate that such proof or admission was made upon such trial; and such assignee shall be entitled to the costs, to be taxed by the proper officer, occasioned by such notice; and such costs shall, in case the assignee shall obtain a verdict, be added to his costs; and if the other party shall obtain a verdict, shall be set off or deducted from the costs which such other party would otherwise be entitled to receive from such assignee.

Sect. 11. And be it further enacted by the authority aforesaid, that, from and after the passing of this act, in all suits in equity now instituted or hereafter to be instituted by or against any assignee of any bankrupt, the commission of bankrupt, and the proceedings of the commissioners under the same, shall be evidence to be received of the petitioning creditor's debt, and of the trading and bankruptcy of such bankrupt, as against all the other parties in such suit, unless such parties, some or one of them, shall, within ten days after rejoinder in the cause give notice in writing to the assignee that they or he intend to dispute the said trading, petitioning creditor's debt, or act of bankruptcy, or some or one of such matters: and, where such notice shall have been given, if the assignee shall prove the matter so disputed to the satisfaction of the court, the costs occasioned by such notice, to be taxed by the proper officer, shall, if the court see fit, be paid by the party or parties giving such notice to the assignee, and the service of such notice may be proved by affidavit upon the hearing of the cause. See *Ellis v. Shirley*, 3 Camp. 424; *Jones v. Llewellyn*, 1 Mer. 6, note(a); and *Mills v. Bennett*, 2 M. & S. 556. But see *Humphries v. Coggan*, 1 Rose, 226.

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 1827.—*Walbranke v. Sparks.*


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the notice of a party's intention to dispute the validity of the commission which was \*required by the two preceding sections, need not be given.

But the Vice-Chancellor ruled that the validity of a commission could, in no case, be disputed where the notice required by the act had not been given.[1]

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WALBRANKE V. SPARKS.

1827; 21st May.—*Practice.*—*Interpleader.*—*Affidavit.*

No affidavit is necessary to support a motion by a plaintiff in an interpleading suit for liberty to pay the money into court, and for an injunction.

THE bill in this case was a bill of interpleader; and, upon a motion made by Mr. Parker and opposed by Mr. Knight, the Vice-Chancellor ruled that the plaintiff in an interpleading suit might move for liberty to pay the money, the subject of dispute between the defendants, into court, and for an injunction to restrain the defendants from suing him at law respecting it, without supporting his motion by an affidavit of facts.[2]

[\*386]

\*GAYLER V. FITZ-JOHN.

1827; 25th May, and 1st June.—*Practice.*—*Attachment.*

An order for time to answer, unless drawn up and served, will not stop an attachment.

ON the 4th of May the defendants obtained an order for six weeks time to answer the bill, and bespoke the order on the 5th. On the 8th the order was

[1] How far partners may convert an individual into a joint debt, so as to entitle a creditor to satisfaction out of a trust fund created for the payment of partnership debts, see *Colt v. Wilder*, 2 Edw. V. C. Rep. 484; where M'Coun, V. C., commenting on the case in the text, observes: "The Vice-Chancellor held that the debt being in judgment upon securities, and which the creditor had thought proper to accept, it took its character from the securities, and was consequently an individual and not a joint debt. But he expressed no opinion upon the effect of the transaction in borrowing the money, whether it would not have been a partnership debt; and as to which I think there could not have been a moment's hesitation, had not the note of one partner been taken and followed up by a warrant of attorney and judgment and execution against him individually; the very form and nature of which precluded all inquiry as to its being a partnership debt, especially when the question arose in relation to the effect of the levy made by the execution itself." Where a bank had given credit individually, by discounting an individual note, it was not allowed to prove this debt in a copartnership suit, although the drawer and endorser were two of the partners, even on strong allegation that the note was made for, and was applied to, partnership purposes: nor could the drawer have his benefit, especially as he had submitted to a decree and report in the cause whereby the endorser was recognized as having assumed the note individually; *Coster v. Clarke*, 3 Edw. V. C. Rep. 411.

[2] Vide *Jew v. Wood*, 1 Cr. & Ph. 193. *Merredyth v. Molloy*, 1 Fl. & Kell. 195. 2 Hoff Ch. Pr. 103.

1827.—Jones v. Powell.

drawn up and served on the plaintiff's clerk in court. On the 5th, the plaintiff sealed an attachment against the defendants for want of an answer.

Mr. *Knight*, for the defendants, now moved to set aside the attachment for irregularity, on the ground that the order for time to answer had been obtained before the attachment was sealed, and that it took effect from the time it was pronounced.

Mr. *Heald*, contra, said that the order for time had no operation until it was served, and, that, therefore, the attachment had been issued regularly; and he cited *Wallis v. Glynn*.(a)

The Vice-Chancellor said that he considered the case of *Wallis v. Glynn* as precisely in point; for that if an order for time would not prevent the issuing of an attachment, unless the original was shown to the plaintiff at the time when he was served with the copy, *a fortiori*, an order not drawn up could not stop an attachment.[1]

## \*JONES V. POWELL.

[\*397]

1827; 13th June.—*Practice*.—*Master's certificate*.

The master's certificate, as to production of books, &c. by a party, cannot be excepted to; a motion must be made to quash it.

THE question in this case was, whether a master's certificate, as to the production, by a defendant, of books, papers and writings, in his custody or power, relating to matters in question in the cause, could be excepted to.

Mr. *Horne* and Mr. *Koe* for the defendant, who had taken the exceptions, contended that there was no other mode of appealing from the master's judgment, and referred to a decision to that effect by Sir J. Leach, V. C. in the cause of *Harris v. De Tastet*, on 9th April, 1823.

Mr. *Heald* and Mr. *Tinney* appeared for the plaintiff.

The Vice-Chancellor said that the difference between a report and a certificate was that, with respect to the former, the court had laid it down, as an inflexible rule, that before exceptions could be taken to it, objections must be carried in before the master; but that there was no such rule with respect to the latter: that, if a certificate like the one in question could be excepted to, he did not see why exceptions might not be taken also to a certificate, given by the accountant general, as to stock standing in his name: that the proper course was to move, on affidavit, that the certificate might be quashed.

Exceptions overruled.[2]

(a) Coop. 282. S. C. 19 Ves. 380.

[1] Vide 1 Hoff. Ch. Pr. *Kirkpatrick v. Meers*, 2 Sim. 16.

[2] The above case was questioned by Shadwell, V. C., in *Chennell v. Martin*, 4 Sim. 340, who observes that he was not aware of any distinction between a master's report and a master's certificate; but it is confirmed by the later decision of Lord Langdale in *Kemp v. Wade*, 2 Keen, 686; and see *Jones v. Totty*, ante, 156.

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 1827.—SIDDEN v. LIDDIARD.
 

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[\*388]

\*SIDDEN v. LIDDIARD.

1827; 15th June and 17th July.—*Construction of order.*—*Production of books, &c.*

A party ordered to produce books, &c. before the master, is bound to leave them, if the master thinks fit so to direct.

On a motion made by Mr. Agar in this cause, the question was whether, under the order, usually inserted in decrees, that the parties shall produce before the master all books, &c. as the master shall direct; the master was authorized to order the parties to leave such books, &c. in his office; or whether a new order must not be obtained for that purpose?

The Vice-Chancellor ordered the motion to stand over, in order that he might consult the other judges of the court upon the subject; and on the 17th of July said, that he had conferred with the Lord Chancellor and the Master of the Rolls upon the subject, and that they concurred with him in opinion that, under the usual order for production of the books, &c. the master was at liberty, without any further order being obtained, to direct the party to leave the books, &c. in his office, so long as he thought any useful purpose might be answered by their remaining there, and then to allow the party to take them back.(a)[1]

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[\*389]

\*NEAME v. WAGSTAFF.

1827; 16th June.—*Practice.*—*Process.*

Where a messenger has been sent upon a return of *cepi corpus*, and the defendant is in K. B. prison upon mesne process, a *habeas corpus* must next be obtained.

THE defendant had been attached for want of an answer, and the sheriff had returned *cepi corpus*. A messenger was then sent, but did not take the defendant, as he was in custody in the King's Bench Prison, upon mesne process.

Mr. O. Anderdon now moved for a *habeas corpus*, but said he doubted whether he ought not to have applied for a sequestration, and referred to *Holme v. Cardwell*.(a)

The Vice-Chancellor made an order for a *habeas corpus*, with a view to the defendant being turned over to the Fleet.

(a) By the 60th of the orders issued on the 3d April, 1828, for the regulation of the practice and proceedings of the court, it is ordered: "That where, by any decree or order of the court, books, papers or writings are directed to be produced before the master for the purposes of such decree or order, it shall be in the discretion of the master to determine what books, papers or writings are to be produced, and when, and for how long they are to be left in his office; or, in case he shall not deem it necessary that such books, papers or writings should be left or deposited in his office, then he may give directions for the inspection thereof by the parties requiring the same, at such time and in such manner as he shall deem expedient.

(b) 3 Madd. 114.

[1] Acc. *Shirley v. Earl Ferrers*, 1 Myl. & Cr. 304.

1827.—*Nichol v. Gwyn.*

**NICHOL v. GWYN.**

1827 ; 28th May, and 4th July.—*Practice.—Attachment.*

Attachment granted for non-appearance to a subpoena served abroad.

On the 8th of March, 1827, the defendant was served, in Paris, with a subpoena to appear and answer the bill. The plaintiff's solicitor afterwards wrote to the defendant's solicitor, to inquire whether the latter meant to appear to the bill. The defendant's solicitor, in reply, admitted that the subpoena was in his possession : and said, that he had searched, but could not find that any bill had been filed ; but that, if the defendant was regularly served, he should appear for her.

Mr. *Knight* for the plaintiff now moved for an attachment for want [\*390] of appearance : he said that the correspondence between the solicitors acknowledged the service of the subpoena : and he cited *Scott v. Hough* ; (a) *Bourke v. Lord Macdonald* ; (b) and *Shaw v. Lindsay*. (c)

Motion granted. [1]

Reg. Lib. B. 1826. fol. 1303.

**PEYTON v. BOND. PEYTON v. ROBINSON.**

1827 ; 1st and 15th June.—*Practice.—Prochein ami.*

The court will remove a next friend and appoint a new one, where the former is so connected with a defendant, having an interest adverse to that of the infants, as to make it probable that their interest will not be properly protected by him.

THE original bill was filed by Mrs. Peyton against her husband, and the trustees of her marriage settlement. Mrs. Peyton afterwards died, having, by her will, which she was empowered to make by her settlement, disposed of her property in favor of her two infant daughters. The father instituted proceedings in the prerogative court, and afterwards in the court of delegates to set aside the will ; but without success. In consequence of Mrs. Peyton's decease, a bill of revivor and supplement was filed by the daughters, by Isaac Peyton, their uncle, as their next friend.

Mr. *Heald*, and Mr. *Beames*, now moved, that Isaac Peyton might be removed from being the next friend of the infants ; and that it might be referred to the master to appoint a proper person to be their next \*friend [\*391] in his place. They said that it appeared, by the affidavits, that the next

(a) 4 Bro. C. C. 213.

(b) 2 Dick. 587.

(c) 18 Ves. 496.

[1] *Sed vide Fernandez v. Corbin*, 2 Sim. 544. The Vice Ch. Harts, afterwards, when Chancellor of Ireland, expressed his dissent from the course he had pursued in *Nichol v. Gwyn* ; but he takes a distinction between the service of a subpoena abroad, and of a notice. *Johnson v. Nagle*, 1 Moll. 240. And see *Cameron v. Cameron*, 2 Myl. & K. 289. *Parker v. Lloyd*, 5 Sim. 508. *Anonymous*, 1 Hag. 1. Service of a subpoena on a defendant out of the state of New York, was formerly considered as good service according to the practice of the court of chancery of that state ; but the present Ch. Walworth has altered the practice in that respect, and, after a review of the authorities, decided that the service of a subpoena upon a defendant in another state or county is irregular and no proceedings can be founded thereon unless the defendant voluntarily appears, or stipulates in writing to accept such service as regular. *Dunn v. Dunn*, 4 Paige, 425.



1827.—*Peyton v. Bond. Peyton v. Robinson.*

friend was a person in low circumstances: that he was the brother of the infant's father: that he was a material witness in the cause for the father, and had been a witness for him in the proceedings in the ecclesiastical courts: that the interests of the father and of the infants were directly adverse to each other: that the solicitor for the infants acted for the father also: that he had been for ten years the father's confidential solicitor; and that it was on his application that J. Peyton had consented to be the next friend of the infants; and they contended that, under such circumstances, it was impossible that the interest of the infants should be protected as it ought to be.

Mr. *Horne*, and Mr. *Knight*, for the next friend, said that the question in the suit was a mere question of law, which it was impossible for either the solicitor or the next friend to prevent being properly submitted to the court, even if they were disposed to do so; and that no case of misconduct had been brought forward against either of them.

Mr. *Sugden* appeared for the trustees, and Mr. *Wakefield* for the father.

The VICE-CHANCELLOR:—The single question in this case is, whether it is proper that this solicitor should continue to act for the next friend, and that the next friend of the infants should be suffered to remain, regard being had to the relation in which he stands to the defendant, the father of the infant plaintiffs?

[\*392] \*I am warranted by high authority in saying that, in family suits, it is proper that the same solicitor should be employed for all parties: but the court will watch with great jealousy a solicitor who takes upon himself a double responsibility; and, if it sees a chance of his miscarrying, will take care, where the plaintiffs are infants, that he shall not be permitted to stand in that relation to an adverse defendant under circumstances of very adverse interest. This gentleman, therefore, ought not to continue the solicitor of the next friend.

If it could be tendered to me, by affidavit, that a man of substance, who is himself unconnected with the parties, and who would employ a solicitor similarly situated, was willing to undertake the office of next friend, I should have no hesitation in making the order immediately, and without making any reference to the master.

Some persons were afterwards proposed, on behalf of the infants, as fit to be appointed the new next friend; but the other parties objected to them: whereupon the Vice-Chancellor made an order in the terms of the motion.[1]

Reg. Lib. B. 1826. fol. 1823.

[\*393]

\*STERNDALE v. HANKINSON.

1827; 19th and 20th June.—*Debtor and creditor.—Statute of limitations.*

A bill filed by one creditor on behalf of himself and the others, will prevent the statute of limitations from running against any of the creditors who come in under the decree.

A., the widow and administratrix of B., continues B.'s trade after his decease. B., at his death, was indebted to C. on balance of account. A continues to receive goods from and to make pay-

[1] Vide *Richardson v. Miller*, ante, 133.

1827.—*Sterndale v. Hankinson.*

ments to C. as B. had done, and she is charged in account by C. with the debt. The payments made by her to C. exceed the debt; but a balance is ultimately due to C. Held that B's debt was discharged by A's payments, and that the ultimate balance cannot be proved as a debt against B's estate.

THE bill was filed, on the 5th of May, 1812, by T. Sterndale and J. Robley, grocers and copartners, and Edward Fogg, W. Birch, and John Hampson, also grocers and copartners, on behalf of themselves and all other the creditors of George Hankinson, grocer, deceased, who should come in, &c. against William Hankinson, Margaret Hankinson, widow, John Marsden, and John Walton. The facts stated in the bill, and admitted by the answers, were that George Hankinson, for many years before, and at the time of his decease, carried on the trade of a grocer at Pendleton in Lancashire: that he was at his death a trader within the meaning of the bankrupt laws; and was also seised of real estates, and possessed of personal estate: that he died on the 27th of June, 1810, intestate, leaving the defendant, W. Hankinson, his eldest son and heir at law, and the defendant, Margaret Hankinson, his widow: that Margaret Hankinson was his administratrix: that he was at his decease indebted to the plaintiffs Sterndale and Robley in 72*l.* 15*s.* 4*d.*, and to the plaintiffs Fogg, Birch, and Hampson, in 35*l.* 4*s.* 2*d.* and to divers other persons: that after his death his widow carried on the trade of a grocer: that a commission of bankrupt had issued against her, under which she had been declared a bankrupt; and that the defendants Marsden and Walton were her assignees. The bill prayed for the usual accounts of the debts due to the plaintiffs and the other creditors who should come in, &c. and \*of the intestate's [\*394] real and personal estates, and that those estates might be applied in payment of the debts of the plaintiffs and the other creditors of the intestate who should come in, &c.

On the 14th of April, 1818, the decree, which is usual in suits of the like nature was made. The master reported that several persons had come in before him and claimed debts to be due to them from the intestate, none of which he had thought fit to allow, except one, which had been proved by the plaintiffs Birch and Hampson, the surviving partners of the late plaintiff Fogg; and that his reason for disallowing the debts claimed by the other persons, was that the testator died in 1810, and that the decree was not made until eight years afterwards, and that no proceedings had been taken for the recovery of those debts whereby the claimants were, as he conceived, barred of any remedy. Three of the persons whose claims had been disallowed excepted to this report.

Mr. Agar, Mr. Parker, Mr. Barber, and Mr. Bickersteth, in support of the exceptions. It is the master, and not the administratrix, who insists that these debts are barred by the statute of limitations. It was decided in *Norton v. Frecker*, (a) that an executor is not bound to take advantage of that statute. Besides, in this case the intestate was a trader, and the 47th G. 3, sess. c. 74, creates a trust for the payment of the trader's debts: and his real estates are

(a) 1 Atk. 521. See also *ex parte Dewdney*, 15 Ves. 479, 498.

1827.—*Sterndale v. Hankinson.*

to be administered in this court. Now the statute of limitations cannot bar a trust.

[\*395] \*If the administratrix had meant to take advantage of the statute, she ought to have taken in a counter-state of facts, which she did not. The rule is that, if a debt is to be contested upon what does not appear upon the claimant's state of facts, a counter-state of facts must be carried in. *Prince v. Heylin*.(b) [To this the Vice-Chancellor assented, and said that if a counter state of facts had been carried in, the creditor might have proved acknowledgments of his demand within the six years; and that the decree directed the master to inquire, not what debts were owing by the intestate at the date of the report, but at the time of the intestate's decease.] The statute of limitations has not of itself any force in courts of equity. Those courts have merely adopted a rule founded on the principles of that statute, and by analogy to it. *Oliver v. Court*.(c) Besides, this bill is in fact a bill by every creditor.

It has been laid down that the filing of a bill will not prevent the operation of the statute. But this position must be thus limited: where the suit is commenced before the six years have run, and the bill is dismissed afterwards, the pendency of that suit shall not prevent the operation of the statute. It is no where laid down that a bill filed and followed up by a decree, does not prevent the operation of the statute. Here the administratrix could not have pleaded the statute, as the six years had not expired when the bill was filed. The *dictum* of Lord Eldon, C., in *ex parte Dewdney*, refers to a case where the statute might have been pleaded when the answer was put in.(d) The [\*396] pronouncing of the decree must be taken to \*have relation to the time when the bill was filed. Is every creditor, immediately on the debtor's decease, to sue the personal representative, and so waste the assets. It is not the fault of any party that the decree was not obtained immediately upon the answer being put in. It was the course of the business of the court that prevented it.

Mr. Heald, Mr. Shadwell, Mr. Duckworth, and Mr. Knight, for the report:—No legatee can obtain a decree for payment of his legacy, without the decree being prefaced with a direction that an account shall be taken of the testator's debts, and that those debts shall be paid. If then these exceptions are to be allowed, the operation of the statute of limitations will be stopped in every case where a bill is filed by a legatee. There are only two modes by which the operation of the statute can be prevented: first, where there has been an acknowledgment of the debt by the party sought to be charged: secondly, where a suit has been instituted which the creditor can control. A suit like the present one is the sole power of the plaintiff on the record: he may dismiss it whenever he pleases. *Hanford v. Storie*.(e) [The Vice-Chancellor: Suppose the court has appointed a receiver to collect the creditor's estate, does the rule apply to that case?] Notwithstanding the court may have appointed a receiver, the creditor who has filed the bill may dismiss it. Before

(b) 1 Atk. 493. (c) 8 Price, 197, 169. (d) See 15 Ves. 497, 498. (e) 2 Sim. & Stu. 196.

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a decree is made, whatever may be the laches of the plaintiff, no other creditor can apply to have the conduct of the cause, the answer to such an application would be: "Institute \*a suit of your own." The other [\*397] creditors' hands are not tied, in any sense, by the commencement of the suit. The filling of a bill by A. does not prevent the statute from running against B. and C. [The Vice-Chancellor: This is not a bill filed simply by A., but by A. on behalf of himself and all other creditors. It is in fact a bill by all the creditors.] No creditor, except the plaintiff, can prove his debt in order to maintain the suit. If the bill is dismissed, the circumstance of its having existed is no answer to a plea of the statute; and there cannot be one rule where the bill is dismissed, and another where a decree is made. If the principle upon which the exceptions are founded is to prevail, a suit may be suffered to remain abated for twenty years, and yet a debt, which was within a year of being barred when the bill was filed, will be kept alive. It is the decree only which stops the other creditors; but before the decree is pronounced the statute will run. *Lake v. Hayes*, (f) *Anon.* (g) *Ex parte Roffey*, (h) *Ex parte Ross*. (i) The 47th Geo. III. s. 2, c. 74, does not place creditors in a better situation than they were in before that statute, except that it subjects the real estates of the debtor to payment of his simple contract debts.

The VICE-CHANCELLOR:—That the commencing proceedings in equity will not prevent the operation of the statute of limitations, is indisputable. If a creditor's bill is dismissed, the pendency of the suit will not prevent the defendant from taking the benefit of the statute.

\*This case has been reasoned on two fallacies, as applied to the jurisdiction of the court. First, the statute does not bar the debt, but the remedy only; and courts of law have permitted the statute to be evaded by recognitions of the demand, to such an extent as to amount, almost, to a repeal of the statute. On this ground I think that the debt exists.

The other fallacy is, that the statute bars the suit in equity; which it does not. But, as courts of equity will not entertain stale demands, they have thought proper to adopt the limit of six years, in analogy to the statute; and pleas of the statute are admitted in these courts by analogy only. Where the circumstances of a case are such as to make it against conscience to apply the rule founded upon this analogy, the court will not enforce it. It has been said that, if a creditor files a bill on behalf of himself and others, and permits it to be dismissed before decree, the statute would apply. I dissent from this proposition; for I think that the court would protect a creditor against any accident of that kind. I have no doubt that, if a creditor file a bill and it appears that the rule adopted by analogy to the statute would affect his demand, but that a bill had been before filed by another creditor, and that the plaintiff in the second suit had, in confidence that the former suit would be prosecuted, abstained from filing his bill, the court would not apply its rule. Every creditor

(f) 1 Atk. 281.

(g) 2 Atk. 1.

(h) 10 Ves. 468.

(i) 2 Glynn &amp; Jam. 46. Affirmed by the Lord Chancellor, 13th August, 1827.

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 1827.—*Sterndale v. Hankinson.*


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has, to a certain extent, an inchoate interest in a suit instituted by one on behalf of himself and the rest ; and it would be attended with mischievous consequences to estates of deceased debtors if the court were to lay down a rule by which every creditor would be bound either to file his bill, or bring [\*399] his action. \*Suits have been instituted in which creditors, in consequence of the deaths of parties and a variety of other circumstances, have been unable to procure a decree for two or three years, although every reasonable diligence may have been used ; and, if the schedule to most of the reports made in suits of this nature were looked through, it would be found, by comparison of dates, that two-thirds of the creditors might have been shut out by a strict application of the rule.

The principle of convenience does not apply ; for the adoption of the rule, in all cases where the six years had run before the decree, would not, for the reasons I have before stated, be a protection to the estates of debtors, in the aggregate.

It has been said that every creditor who files a bill on behalf of himself and the other creditors may dismiss his bill if he pleases. But this proposition is not true to the extent to which it has been stated. I apprehend that it is not the rule of the court that a creditor may, under all circumstances, dismiss his bill. I recollect instances in which a creditor who has filed a bill on behalf of himself and the other creditors, has worked a benefit to himself by the orders of the court, and has attempted to dismiss his bill ; but I have a strong impression that Lord Eldon said that, having given the court possession of the suit by a decretal order, it was not competent to him to defeat any other creditor by dismissing his bill.[1]

I entertain no doubt that every creditor has, after the filing of the [\*400] bill, an inchoate interest in the suit to the extent of its being considered as a demand, and to prevent his being shut out because the plaintiff has not obtained a decree within the six years : and, therefore, I am clearly of opinion that this exception must be allowed.

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Another exception was taken to the report, by the plaintiff Robley, who had claimed a debt of 82*l.* 15*s.* 4*d.* in which the intestate, at the time of his death, was indebted to him, on balance of account, for goods sold and delivered by him and Thomas Sterndale, his late copartner, to the intestate.

It appeared, by the ledger of T. Sterndale and Robley, that the intestate, on the 9th of April, 1809, owed them a balance of 192*l.* 3*s.* 7*d.* From that time to the day of the intestate's death they sold him goods to the amount of 106*l.* 15*s.* 3*d.*, making together 298*l.* 18*s.* 10*d.*, and they received, in cash and goods, during the same period, 142*l.* 11*s.*, leaving a balance of 156*l.* 7*s.* 10*d.* due

[1] It is competent for the complainant to settle with the defendant, and to withdraw his suit at any time before decree : and the defendant himself may claim the right to have the bill dismissed, upon paying what is due to the particular creditor, by whom the suit is brought, together with his costs of suit as between party and party ; *Innes v. Lansing*, 7 Paige, 584.

from the intestate at his death. The balance was struck at the foot of the left-hand page, and was carried over to the following account :

Dr.		MAR'T HANKINSON, PENDLETON.		Cr.			
1810:							
July 5	To Balance brought up, G. H.	471	£.	July 23	By Cash	40	d.
16	To Goods	487	156	Aug. 1	By Cash	8	—
Aug. 25	To Do.	545	21	6	By Cash	20	—
28	To Do.	1	7	27	By Do.	20	—
Oct. 1	To Do.	47	21	Sept. 1	By Cash	5	—
13	To Do.	142	34	12	By Cash (per son Richard)	20	—
	To Copper not received, December 24		9	Oct. 16	By Do. and Copper 10l.	30	—
			10	Nov. 10	By Do.	15	—
				12	By Do.	5	—
				26	By Do. and Copper 11l.	20	—
				Dec. 11	By Do. and Do. 10l.	20	—
				24	By Do. and Do. 10l.	20	—
					Balance carried down	60	13 7
			£			271	6 7
1811:							
Jan. 9	To Balance		60	1811:	By Cash, John Seville, for Coals	1	1 4
	To Soap, 20/	Cash	1	Jan. 9	By Cash	10	—
	To Goods		9	21	Balance carried down	70	11
	To Copper not received, December 10		10			81	12 4
			£			81	12 4
1810:							
Feb. 4	To Balance		70	Feb. 4	By Cash	10	—
22	To Copper not received, December 11		10	23	By Cash	6	—
	To Goods	207	17		By Cash	12	—
	To Do.	231	1		Balance carried down	82	15 4
			£			99	7 4
						99	7 4
1811:							
Jan. 9	To Balance		82	Jan. 11	By Copper (not come)	10	—
			15			10	—
			4			6	—
			£			12	—
						82	15 4
						99	7 4

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[\*402] \*Mr. *Agar* and Mr. *Barber*, in support of the exception:—It will be contended that, from the manner in which the balance of 156*l.* 7*s.* 10*d.* was brought forward in the ledger, Robley adopted Mrs. Hankinson as his debtor, and that therefore he had waived his claim as against the intestate's estate; and *Clayton's case*, in the report of *Devaynes v. Noble*,<sup>(k)</sup> will be relied upon. But this is not like the case of a partner who continues the business and adopts the debt of his deceased copartner. Here there is no contract on the part of the administratrix to take on herself the debts of the intestate. The keeping of these accounts was the act of the creditor, and was not adopted by the administratrix. There always must be two parties to a contract; but there is no evidence that the administratrix was a party to these transactions. Besides, the insertion of the initials of the intestate's name in the account, shows that the plaintiff did not mean to charge the administratrix with that debt, and to release the intestate's estate.

Mr. *Heald* and Mr. *Knight*, for the report:—The plaintiff Robley clearly adopted the administratrix as his debtor, by making her debtor to the amount of the balance due at the intestate's decease; *Clayton's case*.<sup>(l)</sup> It appears, by the ledger, that the balance was once reduced so low as to 60*l.* 13*s.* 7*d.* How then could it ever afterwards amount to 82*l.* 15*s.* 4*d.* as against the intestate? It is impossible that this balance can be due from the intestate's [\*403] \*estate. Indeed it is not pretended that the goods, with which the widow was supplied, were furnished to her as administratrix of her late husband. If all the payments made by her are to be taken in discharge of the 155*l.* 7*s.* 10*d.*, the whole would be discharged; therefore, *quacunqve via*, there is nothing due from the intestate's estate.

The VICE-CHANCELLOR:—I have no doubt that the master's report is right.

It is admitted that a balance of 156*l.* 7*s.* 10*d.* was due at the intestate's death. The widow, having possessed assets, permits accounts to be rendered to her in which she is made debtor to that amount. Between the rendering of the account and the 24th of December in the same year, she paid, to the party rendering the accounts, sums to a greater amount than the balance with which she was charged; and the question is, whether she did not intend to pay the debt of her husband. Suppose that, in December, 1810, a bill had been filed, by this creditor, against the administratrix, to make her account for her receipts on account of the intestate's estate, and that an application had been made in the suit for her to pay the amount of assets received by her into court; if it appeared that she had made payments in discharge of the balance due from her husband, the court certainly would not order her to pay in the whole amount of her receipts, but would, undoubtedly, allow her to retain the amount of payments so made by her.

Exception overruled.[1]

(k) 1 Mer. 572.

(l) Ub. sup.

[1] According to the general doctrine of appropriation of payments, where there are several accounts or transactions between the same parties the debtor has the right to elect to which account

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[\*404]

1827; 18th and 19th June, and 29th October.—*Pleading.—Defendant.—Broker.—Practice.—Exception.*

A broker in the city of London must answer a bill of discovery in aid of an action brought against him by his employer for misconduct, although the discovery will subject him to the penalty of a bond given by him to the corporation, on his admission.

If a general exception is taken to a master's report, and the court is of opinion that the master is right in any one particular, the exception must be overruled.

THE bill stated that the defendants had for several years carried on the business of wool brokers, in partnership together, under the firm of James Weaver & Co., and that the plaintiff had for several years carried on, in Coleman street, the business of a Blackwell Hall factor: that the plaintiff, in the way of his business as a Blackwell Hall factor, had had considerable dealings with the firm of James Weaver & Co., in the way of their business as wool brokers; and that the plaintiff, as a Blackwell Hall factor, had been accustomed to deal extensively in buying and selling wool: that, on the 23d of December, 1820, the plaintiff, for the first time, employed James Weaver & Co., as wool brokers, to purchase for him thirteen bags of Spanish wool; and it was agreed between him and James Weaver & Co., that the amount thereof should be paid for in one month, in cash, with a discount thereon, in favor of the plaintiff, of five per cent on the amount thereof; and Weaver & Co. soon afterwards made out and delivered to the plaintiff a bill on account of such purchase in the following words and figures:—"London, 23d of December, 1820. Bought, for account of Mr. Thomas Green, the following goods; viz.: thirteen bags of Spanish wool, to be weighed in one month, and the amount paid in cash, with five per cent discount, brokerage half per cent. James Weaver & Co." And Weaver & Co., at the same time, made out and delivered to the plaintiff, a bill of parcels or account of the thirteen bags of Spanish wool, to the following effect: "London, 23d of December, 1820. Mr. Thomas \*Green, bought of James Weaver & Co., for [\*405] their principal, thirteen bags of Spanish wool, payable in cash in one month, 52*l.* 14*s.* 4*d.*, discount five per cent, 26*l.* 4*s.* 8*d.*—498*l.* 9*s.* 8*d.*" That the plaintiff, on the bills or accounts being so made and delivered to him,

the payment shall be applied; if he omits to give directions, the creditor may apply it to which account he pleases; and if no application be made by either party, the law will appropriate it according to the justice and equity of the case; and as a general rule, in the absence of all indications of the will or intentions of the parties, will apply the payment to the extinguishment of the debts according to the priority of time; this rule however is subject to qualifications and exceptions. *Seymour v. Van Slyck*, 8 Wend. 403. In cases of running accounts where debts and credits are made at different times, the payments are deemed to have been made toward items antecedently due, in the order of time in which they stand in the account. *United States v. Wardwell*, 5 Mason, 82. *United States v. Kirkpatrick*, 9 Wheat. 720. See further; *Mann v. Marsh*, 2 Caines' Rep. 99; *Robert v. Carnis*, 3 Caines' Rep. 14; *Baker v. Stackpoole*, 9 Cow. 420; *Pattison v. Hull*, ib. 747.; *Stone v. Seymour*, 75 Wend. 19. Amer. Ch. Digest, Debtor and Creditor, VII.



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objected to the words or expressions therein, "for their principal," it being expressly understood between the plaintiff and Messrs. Weaver & Co. that the plaintiff would not accept any contract for wool made out by them as for their principal, and without a name; but that he should always have the name of such principal, in order that he might know with whom he was dealing; and it was also understood between them that Messrs. Weaver & Co. should only purchase for, or sell to the plaintiff, wool at first hand, or from the real importer of such wools: that it is very disadvantageous, to a dealer in wool, to purchase wool at second hand, or from any other person than the importer; and that buyers of wool for sale will give a higher price for wool, if it be supposed to come immediately from the merchant or importer, than from any other dealer in the same article; and that great frauds or impositions have been and are practised upon buyers, by brokers concealing the name of the real owner of wools, or giving in false or fictitious names as the owners, thereby making sales for their own advantage, which would not otherwise be made, and obtaining higher prices than they could otherwise obtain if the names of the real owner or seller was fairly disclosed, as it is the duty of brokers in all cases to do: that the plaintiff objecting as aforesaid, the defendant Stanley informed him that the thirteen bags of Spanish wool belonged to a Mr. Laidlow,

but that Mr. Laidlow did not like his name to be known in the market; [\*406] and \*the plaintiff thereupon took the thirteen bags of Spanish wool, supposing Mr. Laidlow to be the merchant or importer of such wool; but it afterwards appeared, and the fact was, that Mr. Laidlow had been a clerk in some mercantile house, and was not the real owner or importer of the thirteen bags of wool; and that the name of Mr. Laidlow was only used to mislead the plaintiff, instead of giving the name of the real importer or owner; and Messrs. Weaver & Co., in fact, participated in the profit on the sale to the plaintiff of the thirteen bags of Spanish wool, in the name of commission or otherwise, to a considerable amount, instead of selling the same to the plaintiff at the fair market price, with an allowance only of their brokerage, of half per cent on the amount thereof, as they ought to have done; and they well knew that the plaintiff would not have purchased the wool of Mr. Laidlow if he had known who Mr. Laidlow was, or to whom the wool in fact belonged; and Messrs. Weaver & Co. sold the thirteen bags of wool to the plaintiff at, and received from him, a much higher price than the real importer thereof would have done; and they therefore became, and were accountable to the plaintiff for the amount of the profits derived from such sale, and ought to render an account thereof to the plaintiff, and pay to him the amount thereof; and that they ought to be charged with, and allow to the plaintiff, the difference between the price at which they sold the thirteen bags of wool to the plaintiff, and the price at which the same would have been sold to him by the real importer thereof: that the sum of 498*l.* 9*s.* 8*d.*., the amount of the purchase money for the thirteen bags of Spanish wool, after deducting the discount there- [\*407] on, was duly paid by the plaintiff, at the stipulated time, \*to Messrs.

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Weaver & Co.: that, on the 26th of September, 1821, the plaintiff employed James Weaver & Co., as wool brokers, to purchase for him three bags of German wool; and it was agreed between the plaintiff and James Weaver & Co. that the amount thereof should be paid for by the plaintiff, by his acceptance of a bill of exchange, to be drawn upon the plaintiff, and made payable four months after date, with a discount thereon, in favor of the plaintiff, of two and a half per cent on the amount thereof; and Messrs. Weaver & Co. soon afterwards made out and delivered to the plaintiff a bill or account of such last-mentioned purchase, in the following words and figures:—"London, September, 26th, 1821. Bought, for account of Mr. Thomas Green, of Mr. Henry Kirkpatrick, the following goods; viz. three bags of German wool, to be weighed in one month, and the amount paid by your acceptance at four months date, with two and a half per cent discount; brokerage, half per cent. James Weaver." And Messrs. Weaver & Co., at the same time, made out and delivered to the plaintiff a bill of parcels or account of the three last-mentioned bags of German wool, to the following effect:—"London, 26th September, 1821. Mr. Thomas Green, Bought of Henry Kirkpatrick three bags of German wool, payable by an acceptance at four months date, from 26th October, 1821. 229*l*. 8*s*. 6*d*. Discount, two and a half per cent. 5*l*. 14*s*. 9*d*. 223*l*. 13*s*. 9*d*." That, in pursuance of the last-mentioned contract, the plaintiff accepted and delivered to Messrs. Weaver & Co. a bill of exchange, drawn by or in the name of Henry Kirkpatrick, dated the 26th October, 1821, for 223*l*. 13*s*. 9*d*. and thereby made payable four months after date, to the order of Henry Kirkpatrick: that \*this bill was duly taken up and paid by the plaintiff when it became [\*408] due and payable. The bill then stated three similar transactions to have taken place between the plaintiff and Messrs. Weaver & Co. on the 30th October and 22d November, 1821, and 30th October, 1822; and then proceeded thus: that, on the occasion of making the last-mentioned contracts of the 26th-September, 1821, the 30th October, 1821, the 22d November, 1821, and 30th October, 1822, Messrs. Weaver & Co. represented to the plaintiff that Henry Kirkpatrick was a merchant residing in Cheapside in the city of London, and was the person by whom the several quantities of wool mentioned in such contracts had been imported, and that such wool could not be got from any person other than Messrs. Weaver & Co.; and that no other broker than themselves had any sample of such wool: that Messrs. Weaver & Co., prior to the plaintiff making the last-mentioned contracts, offered to sell to him the several last-mentioned quantities of wool, as being in the hands of the importer thereof, namely, Henry Kirkpatrick; but the plaintiff afterwards discovered that the said several quantities of German wool were not, nor was any part thereof, in fact, imported by Henry Kirkpatrick, and that there was not any person resident in the city of London, of the name of Henry Kirkpatrick, who is an importer of wool, but that the wool was imported by one Mr. Fuchs, a German merchant in London: that these wools are not the property of Henry Kirkpatrick, but of William M. Everett, who was a Blackwell Hall factor in London, and a dealer in

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wool, and had been purchased by him through Messrs. Weaver & Co., and that the name of Henry Kirkpatrick was made use of by Messrs. Weaver & Co., with the knowledge that the said wools were the property of [\*409] Everett, \*and not of Kirkpatrick ; and that they were employed by, and received their directions solely from Everett in the sale thereof, and accounted with him for the proceeds thereof ; and that the name of Kirkpatrick was only made use of in order to deceive the plaintiff, Messrs. Weaver & Co. well knowing that they were acting contrary to their duty as brokers, and the understanding between them and the plaintiff, upon the faith of which they were employed by him, and knowing also that the plaintiff would not have bought the wools at all, or would not have given the same price for them, if he had been aware that they were the property of Everett, and not of the importer ; that Messrs. Weaver & Co. were employed, as the brokers of the importer, in the sale to, and purchase of these wools by Everett, and that, previous to the purchase thereof by Everett, samples had been shown by Messrs. Weaver & Co. to the plaintiff, for the importer or importers thereof ; and that the same had been offered to, and agreed for by the plaintiff, or that the plaintiff had made them a bidding for the same before the same were sold to and purchased by Everett ; and that the sales were so conducted by Messrs. Weaver & Co. as to secure a certain profit to Everett, or other intermediate purchaser, to the prejudice both of the importer and of the plaintiff, and to obtain an extra profit or advantage to themselves in the name of commission, or otherwise, instead of selling the wools, directly from the importer thereof, to the plaintiff, as they ought to have done : that Messrs. Weaver & Co. well knew that Mr. Fuchs was desirous of selling wools directly to the plaintiff, and had solicited the plaintiff to purchase his wools ; but that, in order to dissuade the plaintiff from dealing directly with Mr. Fuchs, Messrs. Weaver & Co. repre- [\*410] sented \*the character of Mr. Fuchs to the plaintiff in a very unfavorable light ; and Messrs. Weaver & Co. being employed by the importers of such wools as aforesaid, they were thereby enabled to make a double sale thereof for their own advantage, at the same time, at two different prices, instead of an immediate sale to the plaintiff : that, in order to deceive the plaintiff in such purchase and sale to him, the marks of such wools were altered, and the letter K. introduced therein, as the initial of Kirkpatrick's name, to denote that he was the importer or consignee of such wools : and that Messrs. Weaver & Co. derived an extra profit, to a considerable amount, on the sales to the plaintiff of the last-mentioned quantities of wool, or participated in the profit on such sales to the plaintiff, to a considerable amount, instead of selling the same to the plaintiff at the fair market price, with an allowance only of their brokerage of half per cent. on the amount thereof, as they ought to have done : and Messrs. Weaver & Co. sold the last-mentioned quantities of wool to the plaintiff at, and received from him, a much higher price than the real importer would have done ; and Messrs. Weaver & Co. therefore became and were accountable to the plaintiff for the amount of the profit derived from the

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last-mentioned sales, and ought to render an account thereof to the plaintiff, and pay to him the amount thereof; and that they ought to be charged with and allow to the plaintiff the difference between the price at which they sold the last-mentioned quantities of wool to the plaintiff, and the price at which the same would have been sold to him by the real importer. The bill then charged that the defendants had in their custody divers books of account, &c. relating to the matters aforesaid, and that \*the plaintiff had commenced [\*411] an action at law against them, to recover damages from them, in respect of their fraudulent conduct as his brokers, in the several transactions before mentioned; but that the plaintiff was not able to prove the facts and circumstances before stated without a discovery from the defendants touching such facts and circumstances. And the bill prayed for a discovery accordingly.

The defendant, James Weaver, by his answer, said that he believed that the complainant did carry on, and for several years had carried on, in Coleman street, in the city of London, the business of a Blackwell-Hall factor, and that the complainant, as a Blackwell-Hall factor, had been accustomed to deal extensively in buying and selling wool: and that, by an act of parliament, made and passed in the sixth year of the reign of Queen Anne, intituled: "an act for repealing the act of the 1st year of king James first, intituled: and act for the well garbling spices, and for granting an equivalent to the the city of London, by admitting brokers," it was enacted that, from and after the determination of the then sessions of parliament, all persons that should act as brokers, within the city of London and the liberties thereof, should from time to time, be admitted so to do by the court of mayor and aldermen of the said city, for the time being, under such restrictions and limitations for their honest and good behavior as the court should think fit and reasonable. (a) And the defendant further said that, subsequently to, and in pursuance of the powers given to them by the said act, and the court of mayor and aldermen made certain rules and regulations touching the \*admission of brokers, [\*412] and such rules and regulations had ever since been and still were in force, and, by virtue thereof, every person who applied to be admitted a broker within the city and liberties thereof, was required, previously to his admission, to execute a bond to the mayor, commonalty and citizens of London, in such penalty and with such condition as are contained in the bond mentioned to have been executed by the defendant, and was also required to take an oath to the effect of the oath mentioned to have been taken by the defendant. And the defendant further said that he was admitted to act as a broker, within the city of London and the liberties thereof, by the court of mayor and aldermen, in the year 1814; and that, previous to such admission, the defendant, in compliance with the aforesaid rules and regulations, executed a bond, whereby he bound himself, his heirs, executors and administrators, unto the mayor and commonalty and citizens of the city of London, in 500*l.*,

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to be paid to the mayor and commonalty and citizens, with a condition written under the same bond in the following words :

“Whereas the above bounden James Weaver is, by the court of lord mayor and aldermen of the city of London, allowed to be admitted and sworn a broker within the same city and liberties thereof, to have, use and exercise the said office and employment during the pleasure of the said court, and no longer : now the condition of this obligation is such, that if James Weaver, for and during such time he shall and doth continue in the said office and employment, shall and do well and faithfully execute and perform the same, [\*413] without fraud, covin or deceit, and shall, upon every \*contract, bargain or agreement by him made, declare and made known, to such person or persons with whom such agreement is made, the name or names of his principal or principals, either buyer or seller, if thereto required, and shall keep a book or register, and therein truly and fairly enter all such contracts, bargains and agreements, within three days after making thereof, together with the names of the respective principals for whom he buys or sells, and shall, upon demand made by any of the parties, buyer or seller, concerned therein, produce and show such entry to them or either of them, to manifest and prove the truth and certainty of such contracts and agreements, and, for satisfaction of all such persons as shall doubt whether he is a lawful and sworn broker or not, shall, upon request, produce a medal of silver, with his majesty's arms engraved or stamped on the one side, and the arms of the city, with his name, on the other, and shall not, directly or indirectly, by himself or any other, deal, for himself or any other broker, in the exchange or remittance of money, or in buying any tally or tallies, order or orders, bill or bills, share or shares, or interest in any joint stock to be transferred or assigned to himself or any broker, or to any other in trust for him or them, or in buying any goods, wares, or merchandizes to barter or sell again, upon his own account, or for his own or any other broker's benefit or advantage, or make any gains or profit in buying or selling any goods over and above the usual brokerage, and shall and do discover and make known, to the court of lord mayor and aldermen, in writing, the names and places of abode of all and every person and persons as he shall know to use and exercise the said office or employment, not being thereunto [\*414] \*duly authorized and empowered as aforesaid, within thirty days after his knowledge thereof, and shall not employ any person under him to act as broker within the said city and liberties thereof, not being duly admitted as aforesaid, and shall not presume to meet and assemble in Exchange-alley, or other public passage, within the said city and liberties thereof, other than upon the Royal Exchange, to negotiate his business and affairs of brokerage, to the annoyance or obstruction of any of his majesty's subjects, or any other in their business or passage about their occasions, then this obligation to be void and of none effect, or else to be and remain in full force and virtue : and the defendant further said that, in further compliance with the aforesaid rules and regulations, he, previous to his admis-

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sion as aforesaid to act as a broker, was required to take and did take an oath, administered to him by the proper officer of the said city, which was in the words and figures, or to the purport and effect following; (that is to say,) "I do sincerely promise and swear that I will truly and faithfully execute and perform the office and employment of a broker, between party and party, in all things appertaining to the duty of the said office or employment, without fraud or collusion, to the best of my skill and knowledge: and the defendant further said that the bond, so executed by him as aforesaid, had, ever since, been and still was in full force, and that he, ever since the date of the bond, had continued in the office or employment of a broker within the city of London and the liberties thereof; and that all the transactions whereof a discovery was sought by the bill from the defendant took place within the city of London and the liberties thereof; and that, by the said act of the 6th of

\*Anne, it was further enacted that if any persons, from and after the [\*415] determination of the then session of parliament, should take upon him to act as a broker, or employ any other under him to act as such, within the said city and liberties, not being admitted as aforesaid, every such person so offending should forfeit and pay to the mayor, commonalty, and citizens of the city, for every such offence, the sum of 25*l.* to be recovered in manner therein mentioned: and the defendant further said that, by another act of parliament, passed in the 57th year of Geo. 3, intituled: "an act for granting an equivalent for the diminution of the profits of the office of gauger of the city of London, and increasing the payments to be made by brokers;" after reciting the said act of the 6th Anne, it was amongst other things enacted that so much of the said act as imposed a penalty of 25*l.* upon every person who should take upon him to act as a broker, or employ any person under him to act as such, not being admitted in pursuance of the said act, should be and the same was thereby repealed: and it was thereby enacted that, from and after the passing of that act, if any person should take upon him to act as a broker, or employ or cause or permit or suffer any person or persons to be employed, with, under or for him, to act as such within the said city and liberties, not being permitted in pursuance of the said act therein recited, every such person so offending should forfeit and pay to the use of the mayor, commonalty, and citizens of the said city, for every such offence, the sum of 100*l.*, to be recovered by action of debt, in the name of the chamberlain of the said city, in any of his majesty's courts of record, in which no protection, *es-  
soign*, or *wager of law*, shall be allowed, or any more than one

\*imparlance.(b) And the defendant further said that John Stanley [\*416] and James Hempstead, who by the bill were alleged to carry on, and had for several years carried on, the business of wool brokers in partnership together and with this defendant, under the firm of James Weaver & Co. had not, nor had either of them been admitted to act as brokers in pursuance of the

(b) See 57 G. III. c. 60, sect. 2, *Loc. & Pass.*

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said act of the 6th of Anne : and the defendant further said that he was advised that the discovery sought by the bill, as to the matters not answered by him, might subject him to penalties : and he therefore objected to answer the same, and insisted that he was entitled to the same benefit of objection as if he had pleaded the matters in bar to the said discovery.

The defendants Stanley and Hempstead answered to and admitted the same parts of the bill as Weaver did ; and then set forth so much of the 6th Anne as relates to the admission of brokers, and imposes the penalty of 25*l.* on persons acting as brokers without being duly admitted ; and also so much of the 57th Geo. 8. as was stated in Weaver's answer ; and then concluded thus :—" And these defendants say that they have not, nor have either of them, been admitted to act as brokers, or a broker, in pursuance of the said act of the 6th year of the reign of her late majesty Queen Anne ; that each and every of the transactions in the bill mentioned, in respect of which discovery is sought, took place within the city of London and the liberties thereof ; that they are advised that the discovery sought by the bill, as to the several matters not wholly [\*417] answered by these defendants, \*might subject them to penalties ; and these defendants, therefore, object to answer the same ; and insist that they are entitled to the same benefit of objection as if they had pleaded the said matters in bar to the said discovery."

The plaintiff excepted to each of these answers. The exceptions were thirty-five in number, and embraced the whole of the stating and charging parts of the bill, except the allegations which appear, from the preceding part of this report, to have been answered. The master allowed all the exceptions ; upon which, the defendants excepted, generally, to the master's report.

Mr. *Horne* and Mr. *Pemberton* for the defendants, in support of the exception to the report :—The bill is not filed for the purpose of having the accounts taken between the parties ; but it states, merely, acts done by the defendants which are alleged to be a breach of their duty to the plaintiff, as his brokers ; and that the plaintiff has brought an action against the defendants to recover damages for such alleged breach of duty ; and it prays, simply, a discovery in aid of that action. The ground upon which the defendants contend that they are protected from answering is, that if they have conducted themselves as the bill alleges, they are subject to penalties, and to a criminal prosecution. Now it is quite clear that no person is compellable, in this court, to answer what will so subject him : and that he may claim the protection of the court, by answer and need not plead or demur to the bill, unless he so chooses, even in a case which admits of either of those modes of defence.

[\*418] \*The situation of the defendant Weaver is different from that of the two other defendants. He is a broker, but they are not brokers.

1st. With respect to the defendant Weaver.

The 6th Anne empowered the mayor and aldermen of the city of London to admit persons to act as brokers within the city, under such rules and regulations for their good conduct as the court of mayor and aldermen might think

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proper to make. The court availed themselves of the power thus given them, and one of the rules and regulations which they made was, that every person who should apply to be admitted a broker should take the oath which is set forth in the answer; and another was, that every such person should enter into a bond, to the corporation of the city, in such penalty, and with such sureties and condition as are also stated in the answer. Then the 57th Geo. 3, recites the 6th Anne, and enacts that if any person shall act as a broker, within the city, without being admitted as required by the recited act, he shall forfeit the sum of 100*l.* instead of 25*l.*, the penalty imposed by the recited act. The 57 Geo. 3, therefore, recognizes the power given to the mayor and aldermen, by the 6th of Anne, to make rules and regulations as to the admission of brokers; and, as that act must be supposed to have been passed by the legislature with the actual knowledge of the rules and regulations which the mayor and aldermen had made upon that subject, it is, in effect, a recognition and confirmation of those rules and regulations. Now every one of the allegations of misconduct in the bill, is a violation of one or other of the terms of the condition of the bond; for the defendants are charged with having [\*419] concealed the names of their principals; with having participated in the profits of the sales; and having got higher prices from the plaintiff than the real importer would have done. The defendants therefore cannot be compelled to answer any one of these allegations, as they would thereby forfeit their bonds and become liable to pay the penalty.

Next, the legislature having thought proper to trust the mayor and aldermen with a jurisdiction to make regulations as to the admission of brokers, they required an oath to be taken. The authority to impose this oath was afterwards recognized by the 57 Geo. 3; and the oath is administered by the court of mayor and aldermen, who certainly have the power of administering oaths, and consequently a violation of it would subject the party to an indictment for perjury. It is also alleged that the defendant Weaver permitted the other defendants to act with him as a broker. As they were never duly admitted as brokers, an answer in the affirmative to this allegation would subject Weaver to the penalty imposed by the 57 Geo. 3.

Next, as to the defendants Stanley and Hempstead. They have never been admitted as brokers. If, therefore, they were to admit that they had acted as such, they would become subject to the penalty imposed by 57 Geo. 3. If then none of these defendants are compellable to answer as to their carrying on the business of a wool broker, they cannot be compelled to answer as to their dealings in that capacity.

Besides, it is not necessary for these defendants to prove that the discovery sought would subject them to \*penalties, forfeiture, or a [\*420] criminal prosecution; it is sufficient to show that it might form a link in the chain, or that it would expose the defendant to a gross moral reproach. *Baker v. Mellish.*(c) *Dolder v. Lord Huntingfield.*(d) where what is said, by

(c) 11 Ves. 68. See page 73.

(d) *Ibid.* 283, 287.



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the counsel for the plaintiffs, upon the subject now under discussion, is recognized by Lord Eldon, C. in his judgment on the case. *Shaw v. Ching.*(e) *Rowe v. Teed.*(f) *Paxton v. Douglas.*(g) *Franco v. Bolton.*(h)

If this bill had prayed for an account of the moneys received by the defendants on the plaintiff's account, and not for a discovery in aid of the action, the defendants might perhaps have been compelled to answer the questions which are objected to. But the sole purpose of the discovery is to recover damages for fraudulent proceedings: and the action is founded on a tort.

Mr. *Sugden*, and Mr. *Barber*, for the plaintiff, in support of the master's report:—Several of the allegations in this bill do not tend in any manner either to criminate the defendant, or to subject him either to penalties or forfeiture, and therefore, might have been answered with perfect safety. According to the argument for the defendants, a principal is to have no discovery from his broker, because it may subject the broker to forfeit his bond, or to a [\*421] prosecution for perjury. No bill calling on a broker \*for an account of moneys of his employer in his hands, can be sustained, if the argument for the defendants is to prevail. It is no answer, to a person with whom the broker has contracted to account, that he has entered into this bond. An administrator gives a bond to secure a due administration of the assets, but he is nevertheless bound to account to the next of kin. *Weaver*, by acting as the plaintiff's agent, entered into an implied contract to account, and must abide by the consequences, whatever they may be. If the other defendants are not compellable to answer, any person may act as a broker, though he has not been admitted, and may escape from the penalty. *Faulder v. Stuart.*(i) *Cogamaul v. Verelst.*(k) *Nichol v. Verelst.*(l) *Shackell v. Macaulay.*(m) *Ex parte Dyster.*(n) *African Company v. Parish.*(o) The case of *Paxton v. Douglas* does not apply; for here the defendants agreed to act as the plaintiff's agents, and to take upon themselves all the responsibility of that situation.

Mr. *Horne*, in reply. There is no analogy between the case of *The African Company v. Parish* and the present one; for in that case the defendants were the persons with whom the company had entered into the contract. That was not a case of penalties, but of account; for, by the contract, the freight was to be of a certain amount, if the defendant did not trade in certain articles; and of another, if he did. In *Cogamaul v. Verelst*, the question was, whether the court would grant a commission to examine witnesses. That is not the question here.

[\*422] \*The VICE-CHANCELLOR:—At this moment I have a strong feeling that the defendant is not entitled to protect himself, upon the grounds that have been relied upon, from giving the discovery which it is the object of the bill to obtain. But I will not finally determine the point without looking through the multitude of cases which exist in the books. If this defence is

(e) *Ibid.* 308. (f) 15 Ves. 372. See particularly p. 377. (g) 16 Ves. 239. and 19, 223.

(h) 3 Ves. 368; and *Curson v. Lord De la Zouch*, 1 Swanst. 185. 192. (i) 11 Ves. 296.

(k) 4 Bro. P. C. ed. Toml. 307.

(l) *Ibid.* 416.

(m) 2 Sim. & Sta. 79.

(n) 2 Rose, 249. S. C. 1 Mer. 155.

(o) 2 Vern. 244.

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sustainable, the acts of parliament which authorize the city of London to appoint and control brokers, and which were intended for the protection of the trader, will, instead of having that operation, prevent him from detecting the grossest frauds. If some of the doctrine contained in the *obiter dicta* in the report of *Paxton v. Douglas*, be law, I cannot reconcile it with the decision in *Ex parte Dyster*.

THE VICE-CHANCELLOR :—This case comes on, for judgment, upon exceptions to the master's report. The master has reported that the answer is insufficient; and an exception is taken to that report.

The facts of the case are these: the plaintiff, Green, is a Blackwell-Hall factor, carrying on business in the city of London; the defendants, James Weaver & Co., are persons who are alleged, by the bill, to be co-partners, as brokers, in the same city. The bill is filed for a discovery of facts, to be used as evidence in an action, brought by the plaintiff against the defendants, to recover compensation for damage sustained by their alleged misconduct as the plaintiff's brokers.

\*The plaintiff's case may be stated, shortly, thus. In the year 1821, [\*423] he was a merchant, in the city of London, trading in foreign wools. At the same time, the defendants carried on, in the same city, the business of brokers in co-partnership, under the firm of James Weaver & Co. In that year the plaintiff employed the defendants, as his brokers, to purchase for him thirteen bags of foreign wool; and it was a part of the plaintiff's order, that these brokers should purchase from the importers only; the plaintiff considering it was disadvantageous to buy at second hand. The bill then states that the defendants accepted this agency, and bought the thirteen bags of wool, and delivered with them the usual broker's note; and they also delivered an account or bill of parcels, but which bill of parcels did not specify the name of the seller. It then proceeds to state that the plaintiff demanded the name of the seller, and that the plaintiff insisted that in all future bills of parcels the vendor's name should be inserted. Upon this requisition the defendants stated to the plaintiff that a Mr. Laidlow was the importer and seller of these thirteen bags of wool, but that he, Mr. Laidlow, did not wish his name to appear in the market. This information satisfied the plaintiff, and he received the wool, and paid for it, according to the terms stipulated, between himself and the brokers, as to payment. With respect to these terms it may be sufficient to observe, without stating particularly the terms of payment, that they were such as entitled the plaintiff to expect that he should go into the market, as a purchaser, on the best mercantile footing. The bill then states several other instances of purchases, made for the plaintiff, by the defendants as brokers, in all of which purchases the defendants\*inserted the name [\*424] of Henry Kirkpatrick, as the seller of these several parcels of wool, and that the plaintiff received and paid for these parcels according to the stipulated terms. The plaintiff then alleges that he has since discovered that the representations of the defendants were false and fraudulent: that Laidlow was

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not the importer, nor was he the merchant or the seller of these thirteen bags of wool : that there was no such person in existence as Mr. Henry Kirkpatrick, who was represented as the vendor of the other parcels of wool ; and that the whole of the defendants' transactions, as the plaintiff's agents or brokers (for I take it that agent or broker are convertible terms) were bottomed in fraud : that they were a tissue of misrepresentations, from beginning to end ; and that they, instead of being mere brokers, had an interest in and divided the profits, made from these sales to the plaintiff, beyond the brokerage. He then states, in order to recover compensation for the damage he has sustained through this misconduct on the part of the defendants, that he has brought an action, which is now pending : and, on these allegations, the plaintiff requires from the defendants a full and particular discovery of all the transactions wherein they were acting as his brokers in the purchasing of these wools ; and likewise a disclosure of all books containing entries relating to these transactions : and he alleges that he requires that discovery for the purpose of enabling himself to give evidence in the action, that damages may be awarded accordingly.

Upon a case thus stated, I think that two propositions may be assumed : 1st, that the policy of the law not only requires that a broker or agent should [\*423] act \*with fidelity to his employer, and should be ready, at all times, to render a full and clear account of his transactions ; but, 2dly, from the nature of this case, the defendant must possess, and perhaps exclusively possess, the means of stating that account, which the policy of the law entitles the plaintiff to demand. I think these propositions may be assumed in this case as clear.

The defendants have set up separate defences, but they arrive, in the result, to the same conclusion, namely, that, by giving the discovery, they may subject themselves to penalties, and that a court of equity will not compel a discovery which will produce that consequence. The defendant James Weaver, admits that at the time of the alleged transactions, the plaintiff was a Blackwell-Hall factor in the city of London : and this, which is a fact that the plaintiff might easily prove *aliunde*, is the only substantive fact in which he makes the discovery demanded. As to the other facts, he sets up the statute 6th Anne, by which persons acting as brokers in the city of London, are required to be admitted, as such by the court of the lord mayor and aldermen, and under certain regulations for ensuring to their principals the good conduct of the broker. But perhaps I had better state the language of the defendant from the defence itself.

[His honor here stated the clauses of the acts of parliament, the bond, and the oath set forth in the answer, and then proceeded as follows :]

He then states that Stanley and Hempstead and himself carried on [\*426] business, as partners and wool brokers, \*under the firm of Weaver & Co. : that they never were admitted to act as brokers, and that they are not entitled to act in that capacity ; and that this discovery of the facts

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called for by the bill, would subject himself not only to the penalties, but to give evidence against himself that he has been guilty of a breach of his oath: and, on these grounds, he claims the benefit of the rule of the court which prohibits a man from criminating or subjecting himself by his own discovery, to penalties. The defence I have now stated is that upon which the defendant considers that he is entitled to refuse the discovery.

Now, that the rule of a court of equity is, that a man shall not be compelled to answer to any facts which may tend to criminate him or subject him to penalties or forfeitures, is undeniable; but the due application of this rule to the circumstances of individual cases, has been at all times, a matter of much controversy; and so much so, that I believe, not less than one hundred cases are to be found in the reports, in which the question was, whether the defendant was or not bound to give the discovery sought for. The due application of the rule to the present case, is that which I have labored to arrive at.

If I decide that the defendants are bound to answer, it may be said that my decision is inconsistent with the doctrine laid down by great judges in former cases. If I decide that the defendants are not bound to answer, I may render those acts of parliament, especially framed for the purpose of protecting principals from the dishonesty of their agents, a cover to their agents in the grossest and most scandalous frauds; \*for, stript of the effect [\*427] of the statutes, as inflicting penalties, it would be the common course of the court of equity to compel each of these defendants to state, on oath, whether they were employed as brokers and agents of the plaintiff, and whether they acted in that capacity, and to set forth every particular of each of the defendant's dealings as agent or broker of the plaintiff, and to produce every entry in his books, and every document relating to these transactions. If a court of equity, in this case, protected him from the discovery, the plaintiff's proceeding at law must be quite nugatory; for the materials of evidence must necessarily rest, almost exclusively (as I have observed) in their possession. I hope this question may be decided without my falling into the dilemma of impeaching any anterior decision. I have looked through every case on this subject that was cited; and, most especially, I have applied myself to those which were before Lord Eldon which have been relied on. I have looked through a great variety of those cases, and I believe I have looked through and considered every case that a diligent search in the books has enabled me to find, that has any bearing on this question. Upon those cases that I do not now rely on, it may be sufficient to say they established the general principle, and must protect the defendant against the discovery. But, from the current of authority, I think this result may be derived, as established by a series of decisions, travelling through a long series of years, namely, that a man, by the effect of his own acts, may exclude himself from the benefit of that rule of a court of equity; or, to adopt the expression of a very great judge, he may contract himself out of the protection afforded by the principle of the court. The first case \*that I allude to as estab- [\*428]

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lishing that proposition, that a man may so contract himself out of the protection of the court, is the case of the *African Company v. Parish* decided in 1691. It was a short case, as the majority of Vernon's cases are. It is thus: the African Company hired the defendant's ship to freight. The defendant, by charter-party, as is usual in like cases, agreed that, if the defendant traded in goods the company dealt in, he would pay such and such particular sums, to the company, in respect thereof, that is, in the nature of forfeiture or penalities, and deduct such sums out of the freight which should be coming to him. The bill was filed, by the company, to discover whether the defendant had or had not traded in any such and what goods; and the defendant pleaded the charter-party, (on which it appears that the sums therein mentioned were double the value of the goods themselves, and so were in the nature of a penalty;) and that he ought not to be compelled to make a discovery, by answer, touching the same, so as to subject himself to such penalties. The short decision is: "the defendant must be bound by his own agreement. Having agreed that it shall be deducted out of the freight, he ought to discover, it having been adjudged so, several times, in cases of the Hon. East India Company." (p) Now the note refers to the East India Company's cases, which I have not been able to find. But this note, short as it is, will appear a little elucidated by Mr. Raithby's edition of that book, but it is inconsistent with the principle of other judges. The next case that I find is, *The East India Company v. Atkins*. (q) That case was decided [\*429] about thirty years afterwards, \*in the year 1720; and the language of that case, in the judgment, is very important, as to a subsequent part of the present case. I shall not take up the time of counsel, by going through, deliberately, the whole series of these cases; because, the cases being before them, it will be a waste of time. The short note is this: "that were a man submits to be examined as to matters which are penal to him, equity will not interpose." The result, however, is that, in the judgment in that case, it will be found, on the reasoning, that a man having contracted to make the discovery, is bound to do so. The next case that I consider of importance, is that of the *South Sea Company v. Bumstead*, (r) and was decided eight years afterwards, in 1728. The agreement in that case was under a similar contract, by penalty, not to trade beyond a certain extent, and the discovery sought was, whether he had violated that contract. The objection was, that he should subject himself to penalties. The court thought that, as he had covenanted not to plead or demur, he could not then object to the illegality of that covenant; and that he was bound to make the discovery. And, in the judgment there, the court recognizes the authority of *The East India Company v. Atkins*.

The next case is *Wilson v. Prince*, (s) which appears to be decided in 1746, but is not reported: but it was cited, by counsel in argument, before Lord

(p) 2 Vern. 244. (q) 1 Strange, 168; and 1 Com. 247. (r) 1 Eq. Ca. Abr. 77. (s) 2 Ves. 244.

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Hardwicke ; and I give credit to the citation of the case before Lord Hardwicke.

I think, from this series of decisions, there is sufficient to authorize me to decide that a man may \*contract so as to incur the obligation to [\*430] make the discovery of all the facts relative to that contract, although the effect of that discovery may, incidentally, subject him to pecuniary penalties. The reasoning of Lord Eldon, in the cases of *The East India Company v. Neave*,<sup>(t)</sup> and *Paxton v. Douglas*,<sup>(u)</sup> imply that he assents to the principle, that a man may, by his conduct, incur an obligation to discover the facts, although that discovery may, incidentally, subject him to pecuniary obligations. *Paxton v. Douglas* has been a good deal relied upon by the other side ; and I am free to confess that that case did perplex me excessively by some of the *dicta* laid down by that great judge ; for he went there to the extent of stating, not only that a man should not make a discovery that would subject himself directly to penalty or criminal prosecution, but that every question leading incidentally to that conclusion would be likewise equally objectionable. Now when one comes to look at that as a proposition unexplained, one cannot help seeing that the true principle of a bill in equity, is that every statement of fact in every bill ought to be incidentally leading to the same conclusion, ultimately as the prayer of the bill does lead to ; for the fact is either conducive to the general result, or it is unimportant and irrelevant. But I take Lord Eldon to have meant, (and which perhaps is not very fully explained in the report, and which satisfied my mind a good deal,) not that every fact which may lead to the effect of subjecting a defendant to a penalty, is objectionable ; but, where the sole gist and object of the suit is to convict a man in a penalty, where there would be no other purpose but to have relief in a court of equity \*on the footing of penalty, that, as a court of equity does not relieve [\*431] on penalty, it will not give any incidental discovery. That is the way I reconcile and get rid of the *dicta* laid down in *Paxton v. Douglas*. But, however, when one looks at what Lord Eldon did, in point of declaration, in the other cases, and most especially in the case of *Ex parte Dyster*,<sup>(x)</sup> one cannot help thinking that he could not have intended to lay down the doctrine in a general, unrestricted manner. The case came on upon a bankrupt petition to prove a debt against a certain bankrupt's estate. The objection in answer to the petition, was that, as the petitioner traded as a principal, at the same time as he was acting as a broker and participating in brokerage profits (which the law prohibited) therefore the law would not permit proof to be made of profit acquired by such trading. Lord Eldon throws out a suggestion that he has nothing to do with the act, so far as it respects transactions between the broker and the city of London ; and he permitted the debt to be proved. Now it cannot be doubted that, if he admitted the debt to be proved in that case, the discovery sought by this bill ought to be made.

Then the next question is, inasmuch as the objection to make the discovery

(t) 5 Ves. 173.

(u) 16 Ves. 239, and 19, 225.

(x) 2 Rose, 349 ; and 1 Mer. 155.

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arose, in the cases I have referred to, from the stipulations of instruments under seal, can the solemnity of the seal make that obligation to discover more obligatory in a court of equity, than the moral obligation resulting from principal and agent, when one reposes and another accepts the confidence so reposed? The reasoning of the judgment, in the case of the *East India* [\*432] *Company v. Atkins*, I think \*shows, conclusively, an opinion that such was the moral obligation that on that ground the discovery ought to be made. Although *Strange* is not a book we can place much confidence in, yet in this particular instance, it appears to be a very able and sound judgment, and well reported. I should say that a court of equity knows no difference between a mere moral obligation, and one resulting from stipulation by deed.

If we contrast the circumstances of this case with those of the decisions I have referred to, I think we shall find that this case creates a higher moral obligation to give the discovery than any of those cases. In each of those cases the parties dealt at arm's length. The employer contemplated a breach of the contract by the agent, and stipulated for his own damages in case a breach of contract should take place. In the present case the employer surrendered himself, unconditionally, to the agent whom he employed, in the confidence that the agent sustained the character that he publicly assumed. The employer had no reason to suspect, nor had any means of detecting the misrepresentation of the fact, whether they were, or not, duly constituted legal brokers. Much less could he apprehend that they were daily and hourly living in the violation of the law of the country in so acting; and that they kept this violation lurking in the back ground, to be brought forward, by way of defence, against the just demands of those whose confidence they invited and abused. If a court of equity gives effect to a defence so constituted, I do not know that there can be any reason why an executor or administrator, who has made oath duly to administer the assets, and executed a bond for that purpose, [\*433] may not allege those matters in answer to a bill of \*discovery charging him with fraudulently tendering an account of the assets. This is the ground upon which I act.

I may here guard myself by stating that it is always with reluctance that I have used expressions which may cast imputations on the parties; and, from this place, forbearance is most especially to be observed. But the reasons on which my decision is founded, constrain me to assume, though hypothetically, that the defence against a discovery in this case arises from the motives I have stated. A demurrer admits every fact charged in the bill to be true, a plea does the same, except in so far as every fact is especially traversed. This particular defence (which is neither plea nor demurrer) must be governed by the rules which apply to demurrer and plea: I am therefore, justified in assuming the truth of the facts charged in the plaintiff's bill. If an answer be given, satisfactorily rendering an account and denying the imputed frauds, the hypothetical assumption of the fact by the court in the present discussion, will fall to the ground, and leave no imputation on the defendants.

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Considering the vast importance of the present case to the great commercial interests of the country, I have thought it best to hazard a judgment on the broad principle of the contest, instead of getting rid of the case on the technical distinction.[1] But, in point of form, I think the exception to the master's report could not have been sustained.

The plaintiff has taken thirty-five exceptions. The master has allowed them all. The exception to the \*master's report is single. [\*434] The plaintiff, by that exception, avers that the master ought to have overruled every one of those exceptions. Now, if it can be shown that there is more than one of those thirty-five exceptions which may be allowed against the defendants, without either subjecting themselves to penalties, or without impeaching that rule of Lord Eldon's, taking the rule in its most unlimited extent, still then, in point of form, the present exception cannot stand.[2] If this case rested on the form only, I am free to confess that on that consideration, I should give to the defendants the opportunity of amending their exception. Having, however, given my opinion on the broad principle, (with an anxious wish to be set right if I mistake the principle of the court) I will do no more than overrule the exception to the master's report, and direct the defendants to answer, and give the deposit to the plaintiff.[3]

[1] Vide *Story's Eq. Plead.* 399, 440. A bill of discovery cannot be sustained in any case, where the matter sought to be discovered may be made the subject of a criminal charge; and, Lord Langdale was strongly of opinion, though it was unnecessary to decide the point, that a bill of discovery could not be sustained in aid of an action for a mere personal tort. *Glyn v. Houston*, 1 Keen, 37. And see *Livingston v. Harris*, 3 Paige, 534. *Fleming v. St. John*, 2 Sim. 181. *Atterbury v. Knox*, 8 Dana, (Kent.) 284. If a defendant makes statements in his answer sufficient to show that he has incurred penalties, he cannot refuse to produce documents referred to in it; *Ewing v. Osbaldiston*, 6 Sim. 608. A demurrer by a witness to answering interrogatories, on the ground that he might subject himself to penalties was allowed: *Davis v. Reid*, 5 Sim. 443; and see *Taylor v. Wood*, 2 Edw. 94. *Corporation of the Trinity House v. Burge*, 2 Sim. 411. *Atterbury v. Knox*, 8 Dana, (Kentucky,) Rep. 284. *Conant v. Delafield*, 3 Edw. V. C. 201.

[2] Where there is a general exception to a master's report, and it appears that the master has not been wrong in all the points embraced in the report, the exception will be overruled; *Pearson v. Knapp*, 1 Myl. & K. 312. *Moore v. Langford*, 6 Sim. 323. Exceptions to the reports of masters are in the nature of special demurrers, and the party objecting must lay his finger on the error; otherwise the part not pointed out by the exception, will be taken to be admitted; *Wilkes v. Rogers*, 6 Johns. Rep. 566.

[3] By the practice of the court of chancery of the state of New-York, the party excepting to a master's report is not bound to make a deposit, or to set down the exceptions to be argued; either party may set them down; *Stafford v. Rogers*, Hopk. 98.

END OF PART III.



## CASES IN CHANCERY

BEFORE

### THE VICE-CHANCELLOR.

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[\*435]

\*LUSHINGTON v. SEWELL.

1827.—21st, 25th, and 27th June; and 29th Oct.—*Will.—Construction.—West India estate.—Heir and executor.*

A testator gave all his real and personal estate to trustees in trust, as to one moiety, for A. for life, with remainder to her children; and, as to the other moiety, for B. and her children in like manner. By a codicil he declared that his estates should not be divided equally between A. and B., but in proportion to the number of their children; and he left A. and B., jointly, his residuary legatees. By another codicil, in order to prevent disputes, he gave one of his estates to A. and her heirs, and the other to B. and her heirs, the number of their children nearly equalizing the value of the two estates. In a subsequent codicil he mentioned that he had bequeathed the first estate to A. and her children, and the second to B. and her children: held, that A. and B. were entitled to these estates for their lives only, with remainders to their children; and that they were not entitled to the personal estate, absolutely, but for their lives only with remainders to their children, and in shares proportioned to the number of their children.

If an estate descends subject to a mortgage, and the heir creates a new mortgage for securing the old debt and also one contracted by himself, and fixes a new day of payment; he makes himself liable to both debts, notwithstanding he exempts, in the new security, his person and his property, except what is comprised in the new mortgage from liability in respect of the debts.

*Semble*, that by a devise of a West India plantation, the stock, implements, utensils, &c. upon it, will pass.

MATHEW GREGORY LEWIS, Esq. made his will, dated the 5th of June, 1812, and thereby gave to his mother, Fanny Maria Lewis, an annuity or yearly rent-charge of 1000*l.* during her life, to commence at his decease, and to be paid, half yearly, out of his plantations or sugar-works, penns, lands, slaves, tene-

ments and hereditaments in the island of Jamaica; and, subject to the [\*436] said annuity, he gave, devised and \*bequeathed all his said plantations or sugar-works, penns, lands, slaves, tenements and hereditaments in the island of Jamaica, and all the cattle, mules, live and dead stock, plantation utensils and implements, and instruments of planting and husbandry, and all other property and effects upon or belonging to the said plantations or sugar-works, penns and lands; and all the rest, residue and remainder of his estate real, personal or mixed, in possession, remainder, reversion, expectancy or otherwise howsoever, unto and to the use of William Luther Sewell, and Robert Sewell, Esqrs. and Cyril Jackson, D. D. their heirs, executors, administrators and assigns, according to the different nature and qualities of the pre-

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mises respectively, upon trust to manage, cultivate and improve all his said plantations or sugar-works, lands, tenements and hereditaments in Jamaica, to the best advantage; and, for that purpose, from time to time, to support, repair and keep up all the works and buildings upon the said plantations, penes and lands, and erect new works or buildings when necessary, and also, from time to time, to purchase and put upon, provide and supply his said plantations, penes and lands with all and every such slaves, cattle, stock, and other matters and things which might be necessary for the keeping up, supporting and improving the same; and also to hire, for the use of the said plantations, penes and lands, such slaves as they, in their discretion, should think proper, or make good leases or otherwise, all which outgoings he directed should be deemed and considered as annual contingencies in the respective years in which the same should be incurred: and, as soon as might be after his decease, to convert all his personal estate, in Great Britain, which should \*not consist of moneys, [\*437] stocks in the public funds, or good securities, into money, and to lay out and invest all the moneys to arise therefrom, and all the moneys he should be possessed of at the time of his decease, in the public stocks or funds, or on good real security in England, and to pay one moiety of the clear net proceeds, rents, issues and profits, interests and dividends of his said plantations or sugar-works, penes, lands, slaves, tenements and hereditaments in Jamaica, and of all the slaves, cattle, stock and other effects upon or belonging thereto, or from time to time to be upon or belonging thereto, and of the personal estate in Great Britain converted or to be converted as aforesaid, unto his sister Fanny Maria Lushington, wife of Sir Henry Lushington, Bart. for her life, for her separate use, and, after her decease, to convey, assure, assign and make over one full moiety or equal half part undivided of all his said plantations or sugar-works, penes, lands, slaves, hereditaments, cattle, stock and other effects upon or belonging to his said plantations, penes and lands, and of all his residuary real and personal estate, unto the use of all the children of Lady Lushington who should be living at the time of her decease, equally to be divided between them, as tenants in common, and not as joint tenants, and their respective heirs, executors, administrators and assigns, with cross remainders between them, and, if there should be but one such child, then wholly to such child, his or her heirs, executors, administrators and assigns. The testator declared similar trusts as to the other moiety, for the benefit of his sister Sophia Elizabeth Sheddon, wife of Lieutenant Colonel Sheddon, and her children; and he appointed William \*Luther Sewell, Robert Sewell and Cyril Jack- [\*438] son, the executors of his will.

The testator made the following codicils to his will. The first commenced thus: "There will probably be found a will;" over which was interlined: "It has been destroyed since writing the following." It then proceeded: "made many years ago, as also another will made since my father's death. If any thing contained in this codicil should be contradictory to any part of these two wills, it is my injunction that the preference should be given to this codicil, and

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to the second will before the first. In other respects I mean the instructions contained in those wills, as to the dispositions of my property, are to stand good. I possess, besides, my two estates in Jamaica, some thousand pounds still in the hands of my father's executors, probably six or seven thousand pounds." The testator then, after giving several legacies, and devising his chambers in the Albany to the honorable T. Stapleton, expressed himself as follows :

"As I leave no debts, or very trifling ones, of any kind, I presume that there will be ready money enough to discharge all these legacies, all of which I desire to be paid with the greatest possible dispatch ; but, if there should not be ready money enough in hand, I then direct that the deficiency should be supplied by annually setting aside the one-half of the clear profits of my estates in Jamaica, till the whole shall have been discharged, till when the legacies are to be discharged proportionally. It is my intention that my estates

[\*439] which I have bequeathed to my sisters, should not be \*divided equally between them, but in proportion to the number of their children at the time of my decease.

M. G. LEWIS."

"I leave my two sisters, jointly, my residuary legatees.

"JOHN HATCHARD.

M. G. LEWIS."

"JOHN HATCHARD, jun.

"BENJAMIN WOODBROW."

"To prevent disputes, I leave to my eldest sister, Lady Lushington, and her heirs, my estate of Cornwall, in Jamaica, and to my youngest sister, Mrs. John Sheddon, and her heirs, I leave my property in the estate of Hordley, in Jamaica, the numbers of their respective children nearly equalizing the value of the two properties.

Nov. 1st, 1815.(a)

M. G. LEWIS.

"JOHN HATCHARD.

"THOMAS HATCHARD.

"JOHN KELLY."

The testator made another codicil, dated Maison Diodati, Geneva, August 20th, 1816 : and, with a view to ameliorating the condition of his negroes, ordered that whoever should be in possession of his estate of Cornwall, after his death, should, if a man, pass three months in Jamaica every third year, [\*440] either in person \*or by deputing his son or one of his brothers ; and, if a woman, that she should perform the condition either in person, or by deputing her husband, her son, or one of her brothers, and that nothing should dispense with the performance of this condition except a legal impossibility, in which case the condition should be complied with in the succeeding year, or as soon as it should be possible for the holder of the estate to fulfil it. But should the holder of the Cornwall estate suffer three years to elapse, without fulfilling the condition, and without being prevented by any legal impossibility, then he

(a) The first codicil had no date. The signatures and name of the witnesses are inserted to show that the instruments were intended to be distinct.

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declared the estate to be forfeited to the next heir, who should receive it under the same condition, and, under the same penalty or forfeiture, to the next heir again, and so to pass on, from heir to heir, till the estate should fall into the hands of a person who was willing to hold it on the above condition.

The testator then proceeded thus :—"I have bequeathed my estate of Cornwall to my eldest sister, and to her children after her death. If no one of these persons will accept it on the above conditions, or neglect to fulfil it after acceptance, then I declare the estate to be forfeited to my youngest sister, and to her children after her death, upon the same conditions. If no one of these persons also will fulfil this condition, then I declare the estate to be forfeited to that one of my next legal heirs who shall be willing to perform it; to be forfeited by him or her also upon non-performance. I bequeath my estate of Hordley to my youngest sister and to her children after her death, upon exactly the same condition, of passing three months in Jamaica once in every three years, which I have above imposed \*respecting Cornwall. And [\*441] if no one of these persons performs this condition, then I declare Hordley to be forfeited to my eldest sister, and to her children after her death, upon the same conditions; and, if those conditions are not fulfilled, then Hordley (as well as Cornwall) shall pass to my next legal heir who will perform them. Whether I possess the whole or only the half of Hordley at the time of my death, I declare that the more or less shall make no difference. In that case, I bequeath the whole of Hordley to my youngest sister, and to her children after her death; but I charge it with 15,000*l.*, to be equally divided between the children of my eldest sister; to which purpose, one half of the clear profits of Hordley shall be devoted till the whole 15,000*l.* shall have been discharged. I also declare that any person who may infringe those regulations which I have laid down for the benefit of the negroes on my estates in Jamaica, or who may dare to diminish the comforts and indulgences allowed them by me, shall forfeit his or her interest in those estates. I positively forbid the sale of any negro or negroes who may belong to me at the time of my death. I hereby attach my negroes to the estate to which they may belong at that period, but allow them to be set free: and I declare that any person or persons who shall dare to disobey this order, to have forfeited his or her or their interest in my estates in Jamaica; and I pronounce such sales to be void. I declare that the above conditions are in every respect intended by me to apply to whatever property in Jamaica may be possessed by me at the time of my death, as well as to those estates which are in my possession at this moment."

\*The testator made another codicil, dated, Cornwall House, February 24th, 1806, containing directions as to the holidays to be given to the negroes on the Cornwall estate; and another codicil, dated, Maison Diodati, Geneva, August 23d, 1816, by which he directed that, if the disposition of his Jamaica estates made upon the 20th of August, should be found unintelligible or impracticable, they should be given in trust to the Lord Chancellor for the time being, who was to appoint a person to reside upon each of them, to pro-

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tect the negroes from oppression. For doing which, he was to receive such a portion of the profits of the estate as the Lord Chancellor should think a recompense : and that the remainder should be distributed among his sisters and their children, in such proportions as the Lord Chancellor should think most just and beneficial ; and that no negroes should be sold off his estates, nor removed, except by their own express desire.

The testator, at the time of making his will, was seised in fee of a set of chambers in the Albany ; of a plantation in Jamaica, called Cornwall ; of 600 acres of waste land in the same island ; and of an undivided moiety of another plantation there, called Hordley.

By an indenture, dated the 8th of March, 1766, the Cornwall estate was charged, by William Lewis, the late grand-father of the testator, with the payment to Thomas and Stephen Fuller, of 8,000*l.* and interest.

By indentures, dated the 19th and 20th of December, 1791, after reciting that the original debt, with other sums advanced, amounted to 20,198*l.* [\*443] 6*s.* 11*d.*, the \*executors of William Lewis, together with the Fullers, conveyed the Cornwall estate to Richard Watt, by way of mortgage, for securing to him the repayment of the last mentioned sum and some further advances, amounting in the whole to 24,000*l.* with interest.

By an indenture, dated the 25th day of April, 1807, the mortgaged premises were conveyed, to Philip John Miles, subject to the proviso for redemption contained in the indenture of the 20th of December, 1791.

By an indenture, dated the 20th of May, 1813, the testator confirmed the last mortgage, subject to a proviso that his person and property, except the Cornwall estate, should not be liable to the payment of the mortgage money and interest. On the 31st of October, 1817, the testator agreed to purchase, of George Scott and Mathew Henry Scott, the other moiety of the Hordley estate, for 32,000*l.* to be paid and secured by T. and J. Plummer, on the testator's behalf, as follows : 16,000*l.* on the 30th of June then next, and the remainder by three annual instalments, and to be secured by the bond of T. and J. Plummer ; but the testator, or any other property of his, was not to be responsible to the Scotts, for the purchase money, or to the Plummers, for what they might advance in respect of it.

By an indenture, dated the 31st of October, 1817, made between the testator of the one part, and the Plummers of the other part, after reciting the agreement, and that the Plummers had agreed to pay off the mortgage debt of 24,000*l.*

and the interest then due to Miles, and to pay the 32,000*l.* to the Scotts, [\*444] and that, to secure the payment thereof, the testator had \*agreed to execute to the Plummers a mortgage of Cornwall and of his moiety of Hordley, and that the other moiety should, on the completion of the purchase, be conveyed to the Plummers, in fee, by way of security for their advances in respect of the purchase, and that it had also been agreed that, during the testator's life, his person and all his property out of Jamaica were not to be subject to the payment of the moneys advanced or to be advanced by the Plummers,

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the testator conveyed the Cornwall plantation, subject to the mortgage for 24,000*l.*, and his moiety of the Hordley plantation, to the Plummers, in fee, subject to a proviso for redemption on payment by the testator, in his life-time, or by his heirs, executors, &c. within six months after his decease, all of such sums as the Plummers should pay in discharge of the 24,000*l.* due to Miles, or of the 32,000*l.* to the Scotts, or on account of the Cornwall plantation, or of the testator's moiety of Hordley, or of the other moiety agreed to be purchased, or to or on account of the testator, his heirs, executors, &c. with interest, at six per cent.; and the testator covenanted, with the Plummers, that his heirs, executors, administrators, or assigns, would, within six calendar months after his decease, pay to the Plummers all such sums as should be advanced by them in discharge of Miles' mortgage, or should be paid by them to the Scotts in respect of the 32,000*l.* agreed to be given for the purchase of the moiety of Hordley; and also all such sums as should at any time thereafter become due to the Plummers for any advances they might make for the management or cultivation of the plantations, or otherwise, on the testator's account; and also that the testator's heirs, executors, or administrators, should, within six calendar months after his decease pay, to the Plummers, \*interest, for [\*445] the same several sums, at six per cent. And the deed also contained a covenant, on the part of the testator, to consign the produce of the plantations to the Plummers, so long as any thing should remain due to them, in trust to sell, and out of the proceeds to pay the amount of the contingencies that they might furnish, and to retain such sums as they might advance, or pay or become liable to, for or on account of the said plantations, moieties, and premises, and to indemnify themselves against all sums of money which they should become liable to pay in pursuance of any bill of exchange to be drawn from the island of Jamaica on account of the estates, and then to reimburse themselves the interest due on the sums owing to them in respect of any payments or advances which should have been made by them on any of the accounts before mentioned, and to pay over the surplus proceeds of the consignments to the testator; provided that, after the testator's death, all the moneys to be produced from the consignments should be applied in payment of all the principal moneys to become due to the Plummers, on any of the accounts aforesaid, and the interest thereof: and the indenture also contained a proviso that nothing therein contained, or in a bond of even date, should make the testator personally liable, during his life, or any of his property, except the produce of the moiety of Hordley, contracted to be purchased (which it was thereby agreed should be applied in liquidation of the purchase money, and then of the other advances made by the Plummers,) liable to the payment of the sums thereby secured. The testator executed, at the same time, a bond to the Plummers, conditioned to be void on payment, by his representatives, within six months after his decease, of the sums secured by the last indenture.

\*By an indenture, dated the 1st of November, 1817, the testator co- [\*446] venanted with the Plummers that, in case the sums so secured should

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not be paid within fourteen years from the 31st of October, 1817, the Plummers should be at liberty to foreclose or sell the mortgaged premises.

On the 4th of April, 1818, T. Plummer died, having appointed J. Plummer and W. Wilson, his executors. J. Plummer and Wilson (who after T. Plummer's death was admitted into partnership by J. Plummer,) paid the 16,000*l.*, and gave bonds for the remainder of the purchase money, according to the terms of the agreement. The bonds were duly paid by Plummer, Wilson, and C. J. F. Combe (who had then become their partner) and the Cornwall estate and the entirety of Hordley were conveyed to them, subject to redemption or payment of the 24,000*l.* and 32,000*l.*

On the 16th of May, 1818, (which was before the contract with the Scotts was completed,) the testator died, leaving the plaintiff, Lady Lushington, and Mrs. Sheddon, his sisters, his co-heirs, both by the laws of England and Jamaica. Lady Lushington had ten, and Mrs. Sheddon five children living at the testator's decease. The testator's mother died soon after her son.

The expenses of the Cornwall estate exceeded its profits, but the Hordley estate produced a profit.

The bill was filed by Lady Lushington against the testator's trustees and executors, and against Sir Henry Lushington and his children, and Colonel

Sheddon and his children; and it prayed (amongst other things) that [\*447] \*the rights of all parties under the will and codicils might be ascertained;

that the purchase money for the moiety of Hordley might be paid out of the testator's personal estate and his real estate undevise; that the plaintiff might be declared entitled to the Cornwall estate in fee, or, if she was not absolutely entitled to it, that it might be settled to her separate use during her life; and that a moiety of the residuary personal estate, or a share of it, in proportion to the number of her children, might be also secured for her separate use during her life.

The trustees and executors, by their answer, said that they had been advised that the testator's general personal estate was not, as between his devisees and legatees, liable to pay off the mortgage for 24,000*l.* made by the trustees and executors of the testator's grandfather; but whether any part of the personal estate bequeathed to the same uses, or upon the same trusts as the Cornwall estate, ought to be applied in exoneration thereof to the payment of that mortgage, they left to the court to determine. They submitted whether the bequest of the testator's personal estate to them, by the will, was not of such a nature as to entitle them, as legatees in trust thereof, in case the mortgage debt should be satisfied by application of any part of the personal estate, to stand in the place of the mortgagee, and to have satisfaction, to the extent of the personal estate so applied, out of the moiety of Hordley which descended to the plaintiff and Mrs. Sheddon: and whether the stock and effects on the plantations were not, by force of the will and codicils, annexed to the plantations to

which they respectively belonged, and were not specifically bequeathed [\*448] therewith; \*and that the moiety of the stock and personal chattels and

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effects belonging to the undivided moiety of Hordley, was subject to the trust of the will.

Sir Henry Lushington, by his answer, said that so much of the testator's will as related to the disposition of the plantations, and the slaves and stock thereon, was revoked by the codicil of the 1st of November, 1815; and that, by virtue of that codicil, the plaintiff was entitled to an estate in fee in the Cornwall plantation and the slaves thereon, and absolutely entitled to the stock and effects belonging thereto; and he claimed such right and interest in the said plantation, slaves and stocks, as he was entitled to by his marital rights.

Colonel Sheddon, who had taken out letters of administration to his wife, who died after the institution to the suit, claimed, by his answer, to be tenant by the courtesy of all the testator's real estates in which his late wife took an estate of inheritance, either as devisee or as one of the co-heirs, and to be entitled to such parts of the personal estate as his late wife was entitled to, and to the implements and crops which were on such parts of the estates as it might appear that his late wife was entitled to for her life only.

Mr. Sugden and Mr. Pemberton, for the plaintiff:—The first question is, out of what fund the arrears of the annuity of 1000*l.* given by the will to the testator's mother, must be paid. It is clear that, as the testator has directed this annuity to be payable out of all his plantations or sugar-works, penns, lands, slaves, tenements and hereditaments in the island of Jamaica, \*the [\*449] arrears must be paid out of the plantations of which the testator was seised, *pro rata*.

The next question is what interests the testator's two sisters take in the real and personal estates. By his will he makes his real and personal estates one general fund, and as to one moiety of that fund he declares trusts for the benefit of Lady Lushington, for her life, and after her decease, for her children living at her decease; and he declares similar trusts, as to the other moiety, for the benefit of Mrs. Sheddon and her children; and he attempts to create cross-remainders between the children of both those ladies; but as he had before disposed of the fee, there can be no cross-remainders. If this had been the only testamentary disposition, there would have been no difficulty in deciding upon the rights of the parties. But then we come to the second codicil, in which the testator says that it was his intention that the estates (meaning the real estates) which he had bequeathed to his two sisters, should not be divided equally between them, but in proportion to the number of their children at his decease; and then comes this important line: "I leave my two sisters jointly my residuary legatees." This revokes the disposition of the residue, contained in the will, and substitutes for it a disposition to the two sisters as joint tenants. Now it is perfectly clear that the testator intended to dispose of something. By his will he had made a disposition of the whole of his personal estate, as well as of the whole of his real estate. There was, therefore, no property excluded out of the will to which that clause in the codicil could apply.

Now if there be two clauses in different \*instruments, and the clause in [\*450]



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the latter is inconsistent with that in the former, it must, of necessity, in order to have any operation, operate as a revocation of the disposition contained in the former clause. If the residuary clause in the will did not dispose of the whole personal estate—if there is any thing that would satisfy the bequest in the codicil, it might be contended that the testator did not intend to alter the disposition which he had already made of his general personal estate. But it is impossible to adopt that argument, because the will contains a disposition, in the most ample and unqualified terms, of the whole of his real and personal property; so that, in order to give any effect to the words in this codicil, it is perfectly clear that the court must construe them in their most extensive sense; that is, consider them as having revoked the disposition made of his residuary estate, by his will, and substituted a new disposition for the benefit of the two ladies. It is clear that when the testator made this codicil he intended to alter, most essentially, all the dispositions he had made in his will, except that which gives an annuity to his mother, and to make an entirely new disposition of his property. Accordingly, the whole of the real estate, with the exception of the 600 acres of waste land, is otherwise disposed of by this codicil. The Albany chambers are given, for life, to Mr. Stapleton; and the whole residue of the real estate is given to Lady Lushington and Mrs. Sheddon, in proportion to the number of their children. With respect to the residue of the personal estate, if the court should think that the two legatees were not joint tenants, but tenants in common of it, then we submit that the [\*451] testator intended that they should take it in shares proportioned to the numbers of their children, and consequently Lady Lushington will be entitled to two-thirds, and Mrs. Sheddon to one-third.

The testator then gives his estate of Cornwall to Lady Lushington and her heirs, which gives her the fee in this estate, and in the slaves belonging to it. It is clear that the slaves passed with the estate. By the law of Jamaica, they are real estate: and a subsequent codicil directs that the slaves shall not be removed from the estate. But the stock and effects on the plantations do not pass with the plantations, unless there is some law in Jamaica which makes a distinction between such chattels and the stock and effects on a farm in this country. [The Vice-Chancellor, : may there not be some sense attached, by usage, to the word "plantation," so as to make it include the articles in question?] Under a devise of a plantation there is no greater convenience in holding that the stock and effects upon it pass, than there would be in holding that, under a devise of a farm in this country, the horses, carts, and other implements would pass.

The only words upon which an argument can be founded in support of the interest claimed for the children of Lady Lushington and Mrs. Sheddon, are those in which he directs that in all other respects the conditions of the former bequest are to be adhered to. But there are no other conditions to which this direction may be applied. When, however, we look at the codicil of the 20th August, 1820, it must be admitted that Lady Lushington's claim to the

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fee in the Cornwall estate is considerably shaken, and that she must be \*content with being either tenant for life, or, at the utmost, tenant [\*452] in tail of that estate.

Next as to the regulations which the testator has made in this codicil, for ameliorating the condition of his slaves. All the conditions which the testator, has, with this view, imposed upon his devisees, are void in all respects; as it is an attempt to create a perpetual obligation and condition. [The Vice-Chancellor: is not the condition good for the life of the tenant for life?] It might have been good if it had been so restricted; but it is not. The whole provision is one entire clause. And Lord Eldon, C. decided in *Marshall v. Holloway*, (b) that, where some of the limitations in an instrument are good, and some bad, the latter can not be separated from the former, but that they are void *in toto*. *Lord Southampton v. Marquis of Hertford* (c) is an authority to the same effect.

The debt of 24,000*l.* was, we admit, originally created by the testator's grandfather. But the testator, by his subsequent transactions, made that debt his own. For he blended it with moneys that he himself borrowed. He entered into a new contract, fixed a new time of payment, and so made it entirely his own personal debt. Although he was not liable, even by the deed of 1813, to pay this 24,000*l.*, by the effect of the subsequent instruments he became bound to pay it. He borrowed 24,000*l.* in order to pay off Miles, and engages to repay, not only this sum, but a further sum of 32,000*l.* which he borrowed for the purpose of purchasing the undivided moiety of the Hordley estate; and then he agrees \*with the vendors, not that they [\*453] shall take, as their security, a transfer of Miles' mortgage, but that he will make to them a new mortgage, not of that estate alone, but of the Cornwall estate, his own moiety of the Hordley estate, and the other moiety which he had agreed to purchase. Then, instead of the Cornwall estate being subject to the same equity of redemption as it was before this transaction, he engages that this estate shall be subject to a redemption within six months after his own death, on payment by his representatives, not of the 24,000*l.*, but of the whole of the advances which the Plummers had agreed to make to him, personally and individually, and he enters into a covenant and gives a bond for further securing these advances. *Donisthrope v. Porter*. (d)

The cases in which the personal estate of the owner of land subject to a mortgage, is not liable to pay the debt, are where the land descends or is purchased subject to the debt, or where the owner, on the mortgage being assigned, covenants to pay the debt. *Coventry v. Coventry*, (e) *Evelyn v. Evelyn*, (f) *Tweddell v. Tweddell*. (g) But wherever there is a new contract between the owner of the land and the lender of the money, and a new equity of redemption is reserved, the court will put a different construction

(b) 2 Swanst. 432.

(c) 2 P. W. 222.

(e) 2 V. &amp; B. 54.

(f) Ibid. 659.

(d) 2 Eden, 162.

(g) 2 Bro. C. C. 101 &amp; 152.

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upon the acts of the parties, and hold the debt to be followed by all the usual consequences of a debt, *Woods v. Huntingford*.<sup>(h)</sup> In *Waring v.*

[\*454] *Ward*,<sup>(i)</sup> Lord Eldon, C. seems to sanction the rule as \*laid down by

Lord Alvanley, M. R. in the preceding case. The case of *The Earl of Oxford v. Lady Rodney* <sup>(k)</sup> is precisely in point, and is an express authority for deciding this question in favor of the plaintiff. The deed of October, 1817, contains an express recital of a contract, between the testator and Messrs. Plummer, for the loan of the money to the testator; and there is a new mortgage made, and a new day of payment named; and the sum lent is much greater than that originally borrowed. The 32,000*l.* was clearly a personal debt of the testator: no distinction is made between that sum and the 24,000*l.* The repayment of both those sums is provided for in the same way. both of them are secured by the same bond. This is not a case in which Mr. Miles wished to have his money paid off. In all probability he would have been glad to let it remain, as it drew after it the consignments of this very large property. The fund, therefore, which is first applicable to pay this debt is the testator's general personal estate. The next is the descended estate, namely, the moiety of the Hordley plantation, which the testator purchased after the date of his will; and the last, the devised estates.

But if the court should think that the personal estate is not applicable to the discharge of this debt, but that the burden must be born by the estates on which it was originally charged, then, as the testator has declared that his estates should not be divided equally between his two sisters, but in [\*455] \*proportion to the number of their children, the court is bound so to apportion the debt between the two estates as to effectuate the testator's intention. The testator never treats the debt as a charge upon the Cornwall estate exclusively. By his will, he gives that and the Hordley estate, together with his personal estate, to trustees in trust, as to one moiety for Lady Lushington and her children. and as to the other moiety, for Mrs. Sheddon and her children. So that each class of *cestuis que trust* would have borne half the debt. When the testator comes to the second codicil, he says, that the estates shall be divided between his sisters in proportion to the number of their children. This would have thrown the 24,000*l.* over both the estates. He then takes upon himself to make the division, which is merely a completion of his intention expressed in the second codicil. The plaintiff is therefore entitled to have this debt thrown upon both these estates.

As to the 32,000*l.* paid for the moiety of Hordley, the testator made that moiety a security for the purchase money. That moiety, therefore, being itself pledged for the debt, must bear its own burden, and be the primary fund for payment of the debt.

(h) 3 Ves. 128.

(i) 5 Ves 670, and 7, 332.

(k) 14 Ves. 417. Upon the question here discussed, see Mr. Eden's note of the case of *Donisthrope v. Porter*, in the 2d vol. of his reports, p. 164; and the notes by Mr. Cox and the last editors, 2 P. W. 664, 5.

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The VICE-CHANCELLOR :—There is some doubt in my mind whether the plantation implements and utensils could be attached to the personal estate : and I am inclined to think that there is a sense annexed to the word “plantation” which makes it include the implements and utensils.

\*The reason for holding that the implements and utensils pass under [\*456] the devise of the plantation, is founded on convenience only : and, upon that principle, it might be contended that the furniture in a house upon the plantation would pass, as it is very inconvenient to have a house without furniture, or that by a devise of a farm the implements of husbandry used in its cultivation would pass.

[The VICE-CHANCELLOR :—Suppose it had been a devise of the plantation with its appurtenances ?]

The word appurtenances would be satisfied by holding it to mean that which is appurtenant to the plantation, as real property, and would not include what is personal and not real estate.

If a testator devise his farm as it is then in his possession, it is quite clear that not one single item of personal estate would pass. When he speaks of his farm in his possession, he is speaking of a quantity of land in the course of cultivation. Besides, we do not contend that the plantations are to be stripped of their mills and furnaces, or of any thing else that is attached to the freehold. All that we contend is, that live stock and implements of cultivation and property of that description, which is not in any sense annexed to the freehold, do not pass under the devise of the plantation. Now, unless there is some express law in Jamaica which introduces a distinction between the construction put upon the words in question, in that island, and in this country, there can be no doubt upon this point, unless words are found in the \*testamentary instruments which annex these particular articles to these [\*457] particular estates.

[The VICE-CHANCELLOR :—Although positive enactment may not have done it, may not ordinary usage have some effect ?]

If in the island there is a particular sense put on particular words, that must be by the decision of the courts, and not by the general understanding of mankind as to the law. Wherever a plantation is conveyed, the slaves, stock and implements are mentioned, for the purpose of passing what would not pass under the devise of the plantation.

Mr. *Kindersley*, for the defendant Sir Henry Lushington :—As Sir Henry Lushington may survive Lady Lushington, it is important for him to contend that his wife took an estate of inheritance, and not for life only, in the testator's estates, as he will then be entitled to be tenant by the courtesy of that property.

It must be admitted that, under the will, Lady Lushington would be entitled to the rents of a moiety of the Cornwall estate, and of a moiety of the Hordley estate, for her separate use, for her life. By the first codicil, the testator, who had then learnt that Lady Lushington had a greater number of children than Mrs. Sheddon, divided his property between them in proportion to the

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number of their children. There can be no doubt that, if this codicil stood alone, there would be no alteration in the quantity of estate which [\*458] \*Lady Lushington was to take. Then the second codicil revokes the former devise of those estates, and gives Lady Lushington an estate in fee-simple. The direction that the conditions of the former bequests should be adhered to, had reference to the charge of 1,000*l.* a year in favor of the testator's mother. It may, perhaps, be contended that another of the conditions that were to be adhered to was, that Lady Lushington, so long as she lived, should have the estates for her separate use. Still that would not prevent her husband from having his courtesy. *Roberts v. Dixwell*.(l)

In the third codicil, however, the testator says: "I have bequeathed my estate of Cornwall to my eldest sister, Lady Lushington, and to her children after her death." This makes her tenant in tail; for, wherever a testator indicates an intention to give an estate of inheritance confined to a particular class of heirs, as the issue of the body of the devisee, the courts have held that the devisee takes an estate tail. *Hodges v. Middleton*,(m) *Davie v. Stevens*.(n)

The construction I am contending for is confirmed by the codicil in which the testator gives the estates to the Lord Chancellor for the time being. For he directs that the profits of the estates, after recompensing the person who shall reside on the estates, shall be divided between his sisters and their children, thus showing that he understood that he had given an interest in the estate to the children.

[\*459] The next question that relates to the real estate, is as to the moiety of Hordley. As that was purchased after the date of the last codicil, it descended to the two sisters, in equal moieties. The only other real estates are the chambers in the Albany, and the 600 acres of waste land. These, subject, as to the chambers, to the life estate of Mr. Thomas Stapleton, vested in the trustees under the residuary devise in the will, but controlled by the first codicil, which directs the testator's estates to be divided between his sisters, in proportion to the number of their children.

Next, as to the personal estate. The first question is, whether the stock on the plantations is to be considered as personal estate, or as annexed to the real estates by virtue of the will and codicils. It has been said that a devise of a plantation will pass all the stock and effects on it; but it will no more pass them than a devise of a farm will pass all the implements upon it. The word used by the testator, in the second codicil, when he devises the Cornwall and Hordley plantations, is "estate," and not "plantation." The argument therefore, does not arise. The passage in the will, too, by which he devises the plantations to the trustees, shows that he did not intend that, by the word "plantations," the stock and effects should pass; for, if he had conceived that he had devised the stock by the devise of the plantation, he need not have added, as he did, the words "mills," &c.

(l) 1 Atk. 606; see particularly 609.

(m) Doug. 415.

(n) Doug. 306.

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Then there is another question as to the personal estate, which is, whether or not the stock and implements on the real estate are to be considered as having passed under the residuary clause in the codicil. \*Now the [\*460] residuary clause in the codicil is inconsistent with the same clause in the will. The former, therefore, must prevail; and the stock on the plantations passes by it. If that be so, the two sisters were joint tenants of the personalty; and the whole now belongs to Lady Lushington. At least, the personal property must be divided between the sisters according to the number of their children; and they take their shares absolutely, and not for their lives only.

The testator made the charge of 24,000*l.* his own debt: and such of the charges as are still subsisting must be borne by the two estates in proportion to their values.

Mr. *Lovat* and Mr. *Preston*, for the children of Sir Henry and Lady Lushington:—The will consists of two parts. In the first the testator gives an annuity to his mother: the remainder is occupied by the disposition to his sisters and their children; and he takes anxious care that the sisters should have their shares for their separate use, and that they should have no power to alienate them. When the testator says, in the codicil, that it was his intention that the estates he had bequeathed to his sisters should be divided between them in the proportion of their children at the time of his decease, he meant that they should nevertheless take the same interest in their shares as he had given them by his will. The reason which the testator assigns for altering the disposition in his will, does not require that the quantity of estate, but only that the shares should be different; and throughout these \*instruments the testator appears to consider the children as provided [\*461] for. Then, in the next codicil, he says: "This is in lieu of leaving the two sisters both those estates jointly." And, when he directs that, in every other respect, the conditions of the former bequest are to be adhered to, the point is made still clearer; for, by "conditions" he meant "limitations," inasmuch as there is no condition to be found in the will. The codicil of August, 1816, puts the point beyond all doubt; for, as he says that he has bequeathed his estate of Cornwall to his eldest sister and to her children after her death, he refers us to the will to show what interest they were to take. Besides, this clause alone would make Lady Lushington tenant for life only of the property. *Doe, on dem. of Davis, v. Burnsall.*(o)

As to the stock and other articles on the plantations, it is clear, from the expressions used by the testator, that he did not mean to separate them from the plantations. He does not enumerate these articles as part of his residuary estate, but as distinct from it; and it would be most unreasonable to hold that he intended to separate them, as thereby the plantations would have been rendered of little, if of any value. The trust for the management and cultivation of the

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plantations, removes all doubt upon this question. For it would be absurd to hold that the testator intended the stock, &c. to be sold and purchased again immediately afterwards. The testator too directs his personal estate in Great

Britain to be converted into money, and that his trustees shall convey, [\*462] assure, and make over one \*full moiety of his plantations, slaves, cattle, stock, and other effects, upon or belonging to his said plantations, &c.

It is, therefore, beyond the possibility of doubt, that the testator intended that the things, which are here mentioned as belonging to the estates in the West Indies, should be regarded as part of those estates; and consequently, that Lady Lushington takes an estate, for her life only, in them. But it has been said that, in the codicil, the estates only are mentioned, and not the stock, &c. But, in construing the codicil, regard must be had to the expressions in the will; and then it will be clear, that, although the testator spoke of the plantations only, he meant, not only the plantations, but the articles which he mentions in his will as belonging to the plantations.

The testator's assets are liable to pay off the mortgage; as he entered into an entirely new contract, both as to the amount of the sum secured, and the time of payment; and one part of the debt is not distinguished from the other.

Mr. *Horne* and Mr. *Bickersteth*, for the eldest son of Colonel and Mrs. *Sheddon*:—The second codicil revoked the will, and gave Mrs. *Sheddon* the fee in that moiety of the *Hordley* estate of which the testator was seised when he made that codicil. The reason the testator assigns cannot affect his devise. The direction that, in every other respect, the conditions of the former bequest are to be adhered to, means merely that the other devises and bequests in the will are to stand. The testator, when he made the codicil of August, 1816,

did not mean to make a new devise, but to affix conditions on the per- [\*463] \*sons who were to take the property under the preceding codicil; and

he there treats the property as already disposed of. If a testator, in referring to his will, mistakes the effect of it, he does not thereby revoke his will. The testator did not intend that his general assets should be liable to discharge the mortgages on the plantations, except in the event of the *Cornwall* estate proving insufficient for that purpose. This clearly appears from the language of the deeds executed in the year 1817. The testator merely intended to confirm the old mortgage, and shows the greatest anxiety to guard his general assets from those incumbrances, except in case the *Cornwall* estate was insufficient to pay them; but which is not the case. The 1500*l.* was not to be a charge upon the moiety of *Hordley*, of which the testator was seised when he made his will, but on the other moiety, in the event of his becoming the purchaser of it, and of its passing to Mrs. *Sheddon*. Now as that moiety did not pass, the charge falls to the ground.

Mr. *Pepys*, for Colonel *Sheddon*:—It is the interest of Colonel *Sheddon* to contend that his wife takes an estate of inheritance, for the purpose of establishing his claims to be tenant by the courtesy. In the second codicil, the testator has used words which, standing by themselves, would present a case

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upon which there would be no doubt, inasmuch as he has given the Hordley estate to Mrs. Sheddon and her heirs. The question then is this: whether there be enough on the face of the instruments to control the clear legal meaning of the words which the testator has used in the second codicil. Now, though there may be expressions the sense of which may be controlled by the intention \*expressed in other parts of the instrument, [\*464] yet, where a testator does use words which have a legal meaning, it requires a strong indication of intention to show that he used them, not only in a more limited sense, but in a sense quite contradictory to that in which he had previously used them. He made the codicil of 1816, not with an intention to dispose of the property, or to alter the extent of interest which he had given, but merely for the purpose of introducing the condition for the benefit of the slaves: for he there speaks of the dispositions which he had made to his sisters and their children. It would therefore be a question of considerable doubt whether the court could read this instrument for the purpose of affecting that disposition which he had before made. If then the court will not suffer the codicil of 1816 to be looked at for the purpose of construing the other codicils, we have this simple case; that the testator, by his will, gives the estates to his sisters for life, with remainder to their children; and then, by a codicil, leaves one of those estates to one sister and her heirs, and the other estate to the other sister and her heirs.

Next, as to the point that has been made as to the 15,000*l.* being charged upon the moiety of the Hordley estate that the testator had. This is quite inconsistent with what he had expressed in a former codicil, and with the course he had taken of dividing his property between his sisters according to the number of their children. Therefore what the testator meant was, if he acquired the other moiety, to give the 15,000*l.* to the Lushingtons in order to keep up the equality. This sum was to be paid, out of the moiety of which he was seised, only in the event of his acquiring the other \*moiety; so that Mrs. Sheddon takes the whole of Hordley, subject [\*465] to pay the 15,000*l.* The residuary clause in the first codicil does not create a joint tenancy. The property on the estates passes as part of the residue.

Lastly, as to the mortgage. If a person entitled to an estate gives his personal undertaking to pay off a mortgage upon it, that will not have the effect of altering the mode of payment, and entitling the person who succeeds to the estate to say that the charge shall be paid out of the personal estate in the first instance, although it would make him liable to the mortgagor. In the deed of May, 1813, the testator guards himself, in the strongest terms, against any liability with respect to himself personally, or his estates, except those which were subject to the mortgage. If, on the transfer of the mortgage, he did undertake to pay the debt, that undertaking would not throw the debt on his personal estate. But he has done less, he has empowered the mortgagee to



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come against his property in a certain event only. But even if he had given the creditor an unlimited right to proceed against both him and his property, the right, as between his representatives, would not be altered; so that supposing the cases that have been cited upon this point were correct, they leave the right just where it was.

Mr. *Heald* and Mr. *Shadwell*, for the younger children of Colonel and Mrs. *Sheddon* :—It is clear, from the context of the second codicil, that the testator intended to equalize the division of his property between his two sisters, and not to alter the interests he had given them by his will, and to suffer the chambers in Albany, and the 600 acres of waste land, to go, according to the [\*466] will, in equal *moieties*. With respect to the slaves, they are realty, and no question arises as to them.

Next, as to the residue : as the testator has said, in the first codicil, that the disposition of his property, except where he had expressly altered it, should stand good, it would be a gross violation of his intention to put a construction, on the residuary bequest in that codicil, which would not only exclude the children, but give the whole to the one sister that might happen to be the survivor. His real meaning was, that, though the real estates were to be divided between the sisters in proportion to the numbers of their children, his personal property should be divided between them, equally. By “jointly” he meant “equally.”

The next question is as to the 24,000*l.* Before the execution of the deed of 1813 it is not disputed that the estate charged with that sum would have borne its own burden. If it had descended, the descent would have made no difference; for, as the personal estate had not been benefited, the heir could not have had it exonerated; and the deeds of 1817 leave the matter just where they found it. The original mortgage was kept alive; for the estate was conveyed to the *Plummers*, subject to that mortgage. The testator's person and property, except the moiety of *Hordley* contracted to be purchased, are expressly exempted from all liability. There is no necessity, therefore to resort to cases, as this exemption appears on the face of the instruments. The devisee of the *Cornwall* estate must take it as it is : and the deeds of 1817 have no other effect than as a security. *Perkyns v. Bayntun*.(p)

[\*467] \*We now come to the last point, as to the 32,000*l.* As the testator bought the estate, and it did not pass by his will, it is the usual case, and the heir may compel the money to be paid out of the personal estate. There is a contingent gift only, of the 1500*l.*; to Lady *Lushington*; and the event upon which it was to take effect did not happen. For the testator supposed that his codicil would pass the whole of *Hordley*, if he should, at any future time, become the owner of the other moiety; and it was under that impression, and on that condition, that he gave the 15,000*l.* to Lady *Lushington*.

Mr. *Blenman* and Mr. *Palk*, appeared for the trustees, and other parties.

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Mr. *Sugden*, in reply :—By the first codicil, all the estates given by the will were to be divided between the sisters in proportion to the number of their children. By the second codicil, he makes a different disposition as to Cornwall and the moiety of Hordley, but leaves the chambers and the waste land to be operated upon by the first codicil ; and they are therefore to be divided between the sisters, in the proportion before mentioned.

We now come to the personal estate. The words “my estates,” in the first codicil, mean his real estates only, and not personal estate ; for otherwise the appointment of the sisters to be residuary legatees would have nothing to operate upon. The obvious and natural meaning of the word “estate,” is real estate, and the testator afterwards uses it in that sense.

\*The next question is, what do the sisters take as residuary legatees ; [\*468] which involves the question as to the cattle and stock on the plantations. The court cannot, in point of law, say that they are not to be residuary legatees of all the personal estate of every description. I apprehend, therefore, that the stock and chattels must pass under the residuary bequest in the first codicil. It is convenient that, by the gift of a farm, the stock and utensils should pass ; but the court has never so decided.

Then what is the meaning of : “I leave my two sisters, jointly, my residuary legatees.” Without the word “jointly,” no one could argue in this court that the sisters would not be joint tenants. Can then the introduction of that word make any difference ? What does “jointly” mean : not “separately” or “severally.” There is no hardship in survivorship, as the legatees might sever the joint tenancy immediately. The court has no authority to say that these words should not have the effect which the law gives them.

The VICE-CHANCELLOR :—The bill, in this case, is filed by Dame Fanny Maria Lushington, who is the sister and one of the co-heirs of Mathew Gregory Lewis, a gentleman of great celebrity in this country, against the devisees and trustees of the will, her own husband as having an adverse interest, and her own children, and likewise against Mr. Sheddon, who was the surviving husband of the other sister and co-heir of the testator, and against her children who were likewise interested. This suit is no otherwise adverse than as it has been found absolutely necessary to take the opinion of the court on the rights of the parties arising under the will and \*codicils, and they have [\*469] raised very difficult questions as to their contents, especially as those contents are explained by reference to the nature and quality of the estate which pass by them. It is necessary, in order to make intelligible these testamentary dispositions, to state that the testator, at his death, was seised of an estate in the island of Jamaica, called the Cornwall estate. That estate was furnished, as estates in that country, to make them of any value, must be, with a supply and population of slaves, which, in that country, are real estate.[1] and likewise

[1] In Kentucky, slaves are assets in the hands of executors. *Head v. Perry*, 1 Monroe, (Kentucky,) 255. So, in Jamaica, *Stewart v. Garnett*, 3 Sim. 398.

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with cattle and other live stock, and likewise with plantation implements. The stock and implements are mere personal chattels, but of a peculiar description. The testator, at the same time, was seised of another estate called Hordley, with other persons as tenants in common, which was equally supplied and furnished with slaves, cattle, implements and utensils. That estate was held, as I have already stated, by himself and others, as tenants in common, as were the chattels and moveable implements. He, at the time of making his will and up to the time of his death was unmarried, and his sisters were his presumptive co-heirs at law. It is evident, from the whole context of these testamentary instruments, that his sisters and their children were the objects of his affection and bounty; and we are left to collect the rights and interests of different parties to the same property, by inferences and expressions of the testator himself; and we must look to see what are the expressions of regard and affection to the objects of his bounty, whom he refers to as taking his property. It appears, from the context of these instruments, that his intention was to give to each

of his sisters a moiety of his estate, and to limit that moiety as  
 [\*470] \*transmissible to the children of each sister in equal shares, securing,

to the separate use of each sister, the like enjoyment, protecting it from the husband and limiting the estate to each of their children. The will, in this respect, is perfectly clear; and no doubt could have arisen had he been content with that. He was, besides these plantations, entitled to a large tract of land in the same island, which was stated to be waste and unproductive; but which might be made valuable by cultivation. He had likewise a considerable personal estate, and also a small real estate, which was specifically devised for life, consisting of chambers in the Albany. A moiety of the estate called Hordley he appears to have contemplated to purchase, which he did not hold himself: and some observations will arise on that part of his intention as expressed in his will, not with a view of giving effect to the will as to affect the \*passing of that estate, but to give a construction to his intention as to other parts of his will. This being the state of his property, and his debts being very large, though he declares them to be very trifling, not that he mistook the state of his affairs, but he considered the peculiar class of debt as hardly to be considered as debt, he made his will, which was dated in June, 1812. By that will he gives his mother a rent charge of 1,000*l.* a year for her life. Subject to that, he devises: "all his plantations, or sugar works, penns, lands, slaves, tenements and hereditaments in the island of Jamaica with their members and appurtenances." It is material to observe the language of the devise of this property; as the will appears to have been prepared by a person who was perfectly competent and conversant with the nature of the property he was

[\*471] giving; for one of the attesting witnesses to the will was a \*Mr. Richard Grant, who was eminently skilled in the law of that island, and well acquainted with the nature of the property. He gives, after the annuity: "All my plantations, sugar works, penns, lands, slaves and hereditaments, and all my right, title and interest therein or thereto, and all the cattle, mules, live and

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dead stock, plantations, utensils and implements of planting and husbandry, and all other property and effects upon or belonging to the plantations or sugar works, penna, and lands, and all the rest, residue and remainder of my estate, real, personal or mixed, in possession, remainder, reversion, expectancy or otherwise howsoever in law or equity, or over which I have any power of appointment," to trustees for the after-mentioned purposes. The specialty with which the plantations, stock, utensils and implements, caule, &c. connected with the devise of the plantations, are mentioned, show that the gentleman who prepared the will knew that a gift of the land denuded of its concomitants, was a gift of a burden and not of a benefit. It is likewise not unimportant to remark that the trustees were directed to manage and cultivate and improve all his plantations or sugar works, lands, &c. in Jamaica, to the best advantage, and for that purpose, from time to time to repair and keep up all the works and buildings upon the plantations, and erect new works and buildings upon the plantations, and erect new works or buildings when necessary, and also to purchase and supply the plantations with such slaves, cattle, stock, and other things, as might be necessary for the supporting and improving the same. Now it is material to observe this part of the will, where the testator has deliberately devised the estates, in order to collect his intention, when we come to consider the informal and untechnical mode of \*expression in which [\*472] he afterwards devises a portion of his estate; and I would ask, whether it is possible, regard being had to the nature and quality of the estate in question, that he intended, by that untechnical form of expression, to pass an estate less beneficially accompanied than by the will. He then proceeds, after directing his trustees to convert all his personal estate, in Great Britain, which should not consist of money, into money, and to lay it out on trust, to give one moiety to his sister, the plaintiff, Lady Lushington, for her life, for her separate use, and after her death to her children, with benefit of survivorship between them, with remainder over, in case of failure of her children, to his sister, Mrs. Sheddon, who also has a moiety devised to her in the same way, with corresponding limitations over for the benefit of her children, with limitations to her sister, which need not be stated, as no question arises on them. Then comes that series of codicils which create the difficulty. The testator, in a codicil to his will, says: "There will probably be found a will made many years ago, as also another will made since my father's death. If any thing contained in this codicil should be contradictory to any part of these two wills, it is my injunction that the preference should be given to this codicil, and to the second will before the first. In other respects the instructions contained in those wills, as to the disposition of my property, are to stand good." Now I think it must be admitted that this passage excludes all possibility of presumptive revocation. Wherever he has made a disposition inconsistent with the disposition here made, he has directed that that inconsistent disposition shall prevail over the disposition made in the will. Wherever he has not done so, it is clear that \*these dispositions must stand good as his testamentary intentions. [\*473]

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There is introduced, by way of interlineation, a line, dated the 16th of January, 1813, which says, "It has been destroyed since writing the following;" that is, the will that he speaks of as being probable to be found; therefore the only testamentary disposition to be found would be that which was made since his father's death, which he intended to prevail, except in so far as the subsequent instrument is to be considered as inconsistent with it. He then proceeds: "I possess, besides my two estates in Jamaica, some thousand pounds still in the hands of my father's executors, probably six or seven thousand pounds." Having stated that, as a ground for considering that there will be more than sufficient to pay his debts and legacies, he gives certain specific bequests, which need not be adverted to, as no question arises about them. He then proceeds: "As I leave no debts, or very trifling ones," (although at the time he owed on mortgage about 40,000*l.*,) "I presume that there will be ready money enough to discharge all these legacies, which I desire to be paid with the greatest possible dispatch. But, if there should not be ready money in hand, I then direct that the deficiency shall be supplied by annually setting aside half of the profits of my estates in Jamaica till the whole sum shall have been discharged, till when the legacies are to be discharged proportionally." This shows an intention that the estates should pass, not charged with the debts and legacies, to the sisters for life, and their issue. Then he goes on making a devise inconsistent with that anterior devise. He says: "It is my intention that my estates, which I have bequeathed to my [\*474] two sisters, should not be divided equally between them, but in proportion to the number of their children at the time of my decease. I leave my two sisters, jointly, my residuary legatees." Upon this codicil, which here terminates, it has been contended that the estates were to be apportioned, in value, according to the number of the children of the sisters, one of them having a greater number of children than the other. And this last line: "I leave my two sisters, jointly, my residuary legatees," has been argued upon, and fairly argued upon, as evidence that he intended to revoke that disposition to his sisters, in moieties, as tenants in common, and also to revoke the benefits given to the children; and that this line is to constitute a general residuary devise and bequest of all his estate to both his sisters as joint tenants. Looking at the whole context of the will, and what I shall subsequently state, I think it is quite clear that no such intention was ever contemplated by him. I collect, from this codicil, thus: that, with respect to his plantations, contradistinguished from his other property that passed under the residuary bequest, he intended they should be divided between his sisters, not equally, but in the ratio of the number of children which each had; and that, as to the property which passed under the residuary bequest, his two sisters should be his residuary legatees in the same ratio. Then he seems, at a subsequent period, to have done, for the purpose of explaining himself, and to prevent disputes, that which has created the disputes which he meant to avoid. He goes on: "To prevent disputes, I leave to my eldest sister, Lady Lushington,

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ton, and her heirs, my estate of Cornwall, in Jamaica; and, to my youngest sister, Mrs. John Sheddon, and her heirs, I leave my property in the estate of Hordley, in Jamaica; the number of \*their respective chil- [\*475] dren nearly equalizing the value of the properties: this is in lieu of leaving the two sisters both those estates jointly." Now it cannot be doubted that he does not use the word "jointly" here in its technical sense, creating a joint estate subject to survivorship; but, instead of leaving to each of his two sisters the estate, the number of the children of one sister being greater than the number of the children of the other, induces him to vary the disposition, and, as the value of the Cornwall estate is as much beyond the value of Hordley, as the number of the children of one sister exceeds the number of the children of the other, he leaves to his sister, Lady Lushington, his estate of Cornwall, and to Mrs. Sheddon his estate of Hordley. I think it is as little to be doubted, on this part of the case, (though it was strenuously argued that this devise gave the fee simple to the two sisters in all the estates, leaving nothing to the children,) that the testator did not mean to extend the quantity of estate in his sisters, or that, where he used the word "heirs," he used it attributable to the sisters, and not to those who would take by way of limitation. I have no doubt, notwithstanding the argument, that the codicils do not revoke the substantial and intrinsic limitations of the will to the sisters in the moieties of the plantations. I am likewise of opinion, and shall so declare, that the testator, by the expression "residuary legatees jointly," meant no otherwise than, instead of creating an inequality of division as to the residuary personal estate, and which the antecedent part creates in the real estate, that his residuary estate should be divided between his sisters and their children, equally in point of quantity, though not as a joint estate.

\*Then comes the last codicil; which, at present, I shall use for no [\*476] other purpose than to fortify the construction that I divine from the obscure codicils with reference to any revocation of these limitations of the estate which were given to the sisters—that he could not have meant that one sister should, in the event of a survivorship, take the whole, or that the sisters should take absolutely in exclusion of their children. It is to be observed that, throughout the codicil, he confines himself to regulations calculated to preserve the happiness and comfort of the slaves, who are to a certain extent under the control, and objects of the protection and bounty of the owners. He provides that the sisters, or those who are to take under the limitations of his will, should, from time to time, reside on the estate, for the purpose of securing the comfort and protection of his slaves. He says: "I have bequeathed my estate of Cornwall to my eldest sister, and to her children after her death." That is a repetition of the devise in the first codicil. If he could have intended to revoke the devise to the sisters and their children, this would be strong enough to restore the original devise, and leave the children just where the will put them. In this situation he died. It appears that the testator had miscalculated, not only the nature and condition of his property, but the value. He considered that

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Lady Lushington, having a greater number of children than Mrs. Sheddon had, would be better provided for by taking, exclusively to herself and children, the Cornwall estate, and that the other sister, who was less burdened with children, would be sufficiently provided for by taking the Hordley estate.

On looking at the result of the master's report, it appears that, by force of [\*477] tuitous circumstances, the Cornwall estate \*has been totally unproductive, and the Hordley estate greatly productive.

Then the question arises as to the way in which the estates are to be burdened with the testator's debts. One question is, out of what fund the annuity of 1,000*l.* a year, which is given to the testator's mother, but which subsisted for a very short time after his death, is to be paid, those who have administered the estate having received, and mixed into one mass, all the produce, and having made all the payments out of that one mass. I am very clear that that annuity must be paid out of the general personal estate, as far as it is competent to pay it; and next, that the real estates, devised to his sisters, must contribute, if necessary, the remainder: and I apprehend that those estates must contribute according to their relative values. How that relative value is to be settled, is one of the most difficult questions I have met with. Because a West India estate will, in some years, be enormously profitable, and, in other years, instead of producing a profit will incur a debt in its cultivation. When, therefore, one looks at the particular nature of a West India estate, one does not know how to deal with the question: and I never met with an instance where it has been directly decided.

Then the question is, how are the debts to be paid. And here is a new, serious question of equitable administration to be decided, having regard to the transactions of the testator and those who preceded him, with respect to the charges which at his death encumbered these estates. His father, at the time of his death, left a mortgage debt upon the estate; and it [\*478] \*appears that the testator derived the moiety of the estate, which the father died seised of, from the gift of the father. It appears that the testator made an assignment of this mortgage to Mr. Miles; and it was transferred from one house to another, as suited the convenience of the parties, but always argumenting the debt, and taking on himself to connect his own debt with that debt which had fallen upon him by transmission from his ancestor. Sometime before his death, he made a contract to purchase the outstanding moiety of the Hordley estate: and it appears, by an expression in his will, that he had that purchase in contemplation; but that declaration cannot be taken into consideration with a view to give any title to the moiety which was afterwards purchased, but it must be considered as having descended to the sisters.

But a question arises upon the transactions respecting the mortgage debts; and, looking at the effect of the instruments by which the testator secured the debt contracted by his ancestors and the debt which he contracted himself, I think that, notwithstanding the doctrine founded in *Ancaster v. Mayer*, the testator must be considered as having adopted the whole debt as his own distinct debt;

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and that there is no equity for separating the whole debt, so as to throw any part of it on the estate which originally descended from his father charged with the debt. The whole, therefore, must be considered as his debt, subject to be paid by the two estates, after applying the personal estate, and the other undisposed of estates; and that it must be paid by the two estates, Cornwall and Hordley, rateably, and according to their relative value; any thing that falls upon the inheritance of these estates must be \*so paid. I am [\*479] aware that there is a peculiarity in the security, which raised a very fair argument; I mean the peculiar way in which the testator has guarded himself, or any part of his property, against payment of this debt during his life: but this circumstance does not prove that the testator did not intend to adopt the whole debt, because he makes no distinction, in that respect, between the debt that he himself contracted, and which therefore was unquestionably his own, and the debt which had been contracted by his ancestor.[1]

The next question arises on that part of the codicil in which the testator devises the two estates. He merely mentions his Cornwall estate and his Hordley estate, not adding "cattle, stock, implements and utensils," and it is insisted, therefore, that, under this latter devise, the devisees are to take merely realty, and that which is personalty is to be considered as undisposed of, or as constituting part of his general personal estate. On the part of Mr. Sheddon it was argued that it went to the sisters, as residuary legatees, and consequently, he was entitled to a moiety, as representing his deceased wife.

I have before stated that I do not know of any decision that the court has come to upon the question; what is to pass under the devise of a West India estate. It was reasoned, here, that it would no more pass any thing beyond the land, than if it were the devise of a farm in England, by the owner who cultivated it, as a farmer as well as owner; because, with it, would not be meant to pass the cattle or stock, or any thing \*more than the [\*480] mere land of that farm. But there is no analogy between the two species of property; and I should have great difficulty in deciding that, if a man gave his West India plantations called A. to a devisee, the gift of that plantation, as a plantation, was to be confined to the mere realty: for, denuded of those accompaniments which would make it productive, such an estate is rather a burden than a benefit. But however, I am of opinion that that case does not, at present, call for any decision on my part. I am of opinion that the testator intended to give, by this codicil, under the denomination of these estates, all those things that are given, by the will, as constituent and component parts of these estates; and that he did not mean to lessen the bequest, though he meant to divide the subject, instead of leaving it as a tenancy in common.[2]

[1] As between the representatives of the real and personal estate the land is the primary fund to pay off a mortgage; *Duke of Cumberland v. Codrington*, 3 Johns. Ch. Rep. 252. *Rogers v. Rogers*, 1 Paige, 190.

[2] Affirmed, 1 Russ. & M. 169. Vide *Steward v. Garnett*, 3 Sim. 398.



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 1827.—Bullock v. Edington.
 

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[\*481]

\*BULLOCK v. EDINGTON.

1827; 23d June.—*Practice*.—*Demurrer*.

The eight days within which a demurrer must be entered with the registrar, are eight office days.

IN this suit, a demurrer was filed on the 9th of April. On the 12th of that month, the registrar's office was closed for the Easter holidays, and was not re-opened until the 24th, on the 25th the demurrer was entered with the registrar. In the interval, no process to compel an answer had issued.

Upon a motion made by Mr. *Wilbraham* and opposed by Mr. *Treslove* and Mr. *Roupell*, the question was, whether the demurrer, in this case, was filed in due time, in compliance with an order of the court, which requires that every demurrer shall be entered with the registrar within eight days after it has been filed, (a) and *Jordan v. Sawkins*, (b) and *Dyson v. Benson*, (c) were cited against the motion.

The VICE-CHANCELLOR:—My idea clearly is, that the eight days mean eight office days; the demurrer therefore was entered in due time. [1]

[\*482]

\*STANTON v. KNIGHT.

1827; 27th June.—*Will*.—*Construction*.—*Usurious debt*.

A testator directed that one of his residuary legatees should be answerable for all debts due to him from the father of the legatee. A debt, though usurious, must be deducted from the legatee's share.

THOMAS KNIGHT, deceased, by his will, made a specific bequest to William Wills the younger, and also gave him a share of his residuary estate, and declared it to be his will, that whatever sums or sum of money, (if any,) principal as well as interest, should be owing to him from William Wills the elder, upon bond or otherwise, at the time of the testator's decease, the property thereby bequeathed to his son, Williams Wills, the younger, should be liable to and answerable for the whole amount of such sum or sums as should or might be then due and owing to the testator from William Wills the elder.

A suit having been instituted for the administration of the testator's estate, the master, in computing the debts which were due from Wills the elder to

(a) See Beam. Ord. 77.

(b) 3 Bro. C. C. 372.

(c) Coop. 110.

[1] Vide *Manners v. Bryan*, 5 Sim. 147. By rule 124 of the court of chancery of the state of New-York, the time on all rules, orders, notices and proceedings, where a time is given or stated, shall, unless otherwise expressly provided, be deemed and taken to be one day inclusive and one day exclusive; but if the time expires on Sunday, the whole of the succeeding day shall be included.

1827.—*Evitt v. Price.*

the estate, had taken into account a bond debt upon which, by agreement between the testator and Wills the elder, usurious interest had been paid, although, on the face of the bond, it appeared that interest at five per cent. only was to be paid. Wills the younger excepted to the master's report.

Mr. *Wakefield*, in support of the exception, said that the testator did not intend that a debt that could not be enforced, should be deducted from the younger Wills' share of the residue: that the testator had in his contemplation legal debts only, and meant the son to run the risk of his father's solvency, and not of the illegality of the debt.

\*Mr. *Horne*, Mr. *Pepys*, Mr. *Duckworth*, and Mr. *Teed*, for the [\*483] other residuary legatees and the executors, admitted that the debt could not be recovered at law, but said that they had nothing to do with the usury of the transaction; that the question was, merely, what was the testator's intention, and whether the debt was not one which the testator considered to be due; and that he had, in direct terms, alluded to the security in his will.

The VICE-CHANCELLOR:—A debt, though usuriously contracted, is, nevertheless, a debt. The statutes against usury preclude the remedy merely; and, when a party comes into this court to be relieved against usury, the court refuses its assistance, unless the plaintiff will consent to pay what is really due.[1] The bond is, on the face of it, a legal one; and the testator never contemplated any objection being made to it on the ground of usury.

Exception overruled.

### EVITT V. PRICE.

1827; 29th June.—*Injunction.*

Injunction granted to restrain the disclosure of secrets come to the defendant's knowledge in the course of a confidential employment.

THE plaintiffs were attorneys, and had for several years employed the defend-

[1] Vide *Rogers v. Rathbun*, 1 Johns. Ch. Rep. 367. *Tupper v. Powell*, id. 439. *Eagleson v. Shotwell*, id. 536. *Fanning v. Dunham*, 3 Johns. Ch. Rep. 122. *Livingston v. Harris*, 11 Wend. 329. S. C. 3 Paige, 533. *Morgan v. Schermerhorn*, 1 Paige, 544. *Judd v. Seaver*, 8 Paige, 554. Amer. Ch. Dig. Interest, X. Where there was a general assignment for the payment of debts, some of which were usurious, and an order of reference had been made to take an account of the debts due from the assignor, some of which were usurious, the court held that "the creditors who come in as claimants under this decree will be entitled to whatever is justly or conscientiously due, although their debts are tainted with usury; so far as the assignment itself either in terms or by necessary implication provides for the payment of such debts. A general provision, however, for the payment, either in such an assignment for the benefit of creditors, or in a devise of real estate in trust to pay debts, will not include debts founded upon an usurious consideration; or a debt *ex turpi causa*, or those which are barred by the statute of limitations. To entitle the usurer to claim in such a case, there must be a clear indication in the assignment, or the will, of an intention on the part of the assignor or testator, that the debts which are illegal and void should be paid out of the fund, as well as those which were legal and valid." *Pratt v. Adams*, 7 Paige, 612. But it had previously been held by Ld. Ch. Brougham, that a devise of lands, or charge upon personal estate for payment of debts, took a debt not actually barred at the time of the testator's death, out of the statute of limitations. *Jones v. Scott*, 1 Russ. & M. 255.

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 1827 — *Holt v. Murray.*


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ant as an accountant, and intrusted him with the affairs and secrets, and allowed him free access to the books and papers of the copartnership and their clients. The defendant having, as the bill alleged, got into his possession, in the course of his being employed, several of such books and papers, and made extracts therefrom, and a dispute having arisen between him and the [\*484] plaintiffs, as to the amount of his demands upon them, wrote a letter to them saying that he considered himself absolved from all obligation to confidence, and at liberty to make public what he might deem necessary, and that he would not sit down *minus*, with the knowledge he possessed. Upon which the bill was filed, praying that the defendant might be decreed to deliver up the plaintiffs all the before-mentioned books, documents, and extracts then in his custody or power, and be restrained from taking and retaining any copies of, or extracts from the last-mentioned particulars; and from communicating the said particulars, or the contents thereof, or any of the information therein contained, to any person or persons whatever; and from communicating any of the information possessed or acquired by him relating to the said copartnership, or the affairs or secrets thereof, or the clients thereof, by means of his having been so employed as aforesaid.

Mr. *Sugden* and Mr. *Wakefield* now moved, *ex parte*, for an injunction in terms of the prayer, and referred to *Cholmondeley v. Clinton*(a) as an authority for granting the motion as to the secrets of the firm and their clients.

The VICE-CHANCELLOR granted the injunction accordingly.[1]

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[\*485]

\*HOLT v MURRAY.

1827; 3d July.—*Foreign attachment.—Judgment debt.*

A judgment in the lord mayor's court obtained against the garnishee, does not entitle the plaintiff to rank as a judgment creditor in the administration of the garnishee's assets.

THE plaintiff proceeded against Hamilton and one Murray, as garnishee, in the lord mayor's court, for a debt of 570*l.* due from the former, and, on the 22d of July, 1816, obtained judgment against Murray as such garnishee. Seven days afterwards, Murray died. On the 3d of November, 1817, the plaintiff filed a creditor's bill, against the executors of the deceased, alleging that the deceased was indebted to him in 570*l.* with an arrear of interest, under the judgment so obtained. The usual decree having been made, the master inserted this debt in the schedule of simple contract debts, and did not compute interest upon it. Upon this the plaintiff excepted to the report,

(a) 18 Ves. 261. S. C. Coop. 80.

[1] That persons who have held a confidential relation with another, as counsel, solicitors, &c., will not be permitted to communicate or make use of the information acquired in that situation, although it has been abandoned by them, or they have been discharged by their employer; see *Carter v. Palmer*, 1 Dru. & W. 722, and cases there cited.

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1827.—*Holt v. Murray.*

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averring that the master ought to have included the debt in the first schedule to his report, and to have computed interest upon it, from the 22d of July, 1816, to the date of his report, inasmuch as the plaintiff was a judgment creditor of the testator.

The record of the judgment in the mayor's court (which was much observed upon in the argument) was as follows :—

“ Before the mayor and aldermen in the chamber of the Guildhall of the city of London.—Richard Holt, by *William Windule* his attorney, demands, against Robert Hamilton, 1,000*l.* of lawful money, &c. which he owes to and unjustly detains from the said plaintiff. For that whereas the said defendant, \*on the 10th day of April, in the fifty-sixth year, &c. at [\*486] the parish of Saint Helen, London, for and in consideration of divers sums of money before that time due and owing from the said defendant to the said plaintiff, in the parish aforesaid, and then being in arrear and unpaid, granted and agreed to pay, to the said plaintiff, the said sum of 1,000*l.* above demanded, where and when he the said defendant should be thereunto afterwards required. Yet, notwithstanding, the said defendant, although often thereto requested, has not yet paid to the said plaintiff the said sum of 1,000*l.* above demanded, or any part thereof, to the damage of the said plaintiff, 20*s.* ; and, therefore, he brings his suit, &c. sworn 570*l.* and upwards : pledges to prosecute, &c.

“ 11 April, 1816.

“ And the said plaintiff, by his said attorney, prays process according to the custom, &c. and it is granted, &c. and thereupon, it is commanded, by the court, to Thomas Newson, one of the serjeants at mace of the said court, that he, according to the custom of the said city, summon, by good summoners the said defendant to appear here in this court, to answer the said plaintiff in the plea aforesaid, and that he return and certify what, &c. and, afterwards, (to wit) at the same court, the said serjeant at mace returned and certified to the said court, according to the custom, &c. that the said defendant had nothing within the said city or the liberties thereof, whereby he can be summoned, nor was to be found within the same. And, at the same court, the said defendant was solemnly called and did not appear, but made default : and now, at this same court, it is alleged, by the said plaintiff, by his said attorney, that Thomas Garland Murray, Esq. \*the garnishee, owes to [\*487] the said Robert Hamilton, the defendant, 570*l.* in moneys numbered, as the proper moneys of the said defendant, and now has and detains the same in his hands and custody, and, therefore, the said plaintiff, by his said attorney, prays process, according to the custom, &c. to attach the said defendant by the said 570*l.* so being in the hands of the said garnishee as aforesaid, so that the said defendant may appear in this court here to be holden, &c. to answer the said plaintiff in the plea aforesaid : whereupon it is commanded, by the court, to the said serjeant at mace, that he, according to the custom, &c. attach the said defendant by the said 570*l.* so being in the hands and custody of

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 1827.—Holt v. Murray.
 

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the said garnishee as aforesaid, and the same in his hands defend and keep, so that the said defendant may appear in this court, here to holden, &c. to answer the said plaintiff in the plea aforesaid; and that the said serjeant at mace return, &c. And, afterwards, (to wit) at a court holden, &c. on Monday the 22d day of April, aforesaid, the said plaintiff, by his said attorney, appears, and the said serjeant at mace returned and certified to the same court, that he, by virtue of the said precept, on the said 11th day of April, between the hours of three and four in the afternoon, had attached the said defendant by the said 570*l.* so being in the hands and custody of the said garnishee, and the same defended, &c. according to the custom, &c. so that the said defendant might appear at this court, to answer the said plaintiff in the plea aforesaid: and thereupon the said defendant, at the same court, was solemnly called and did not appear, but made a first default, which said first default at the same court is recorded according to the custom, &c. [The [\*488] record then stated \*three other days being successively given to the defendant to appear, on each of which he made default.] And thereupon after the said four defaults, recorded by the court against the said defendant in the plea aforesaid, according to the custom, &c. the said plaintiff, by his said attorney, prays process according to the custom, &c. to warn the said garnishee to be and appear in this court to show cause, &c.; whereupon at the same court holden, &c. it is commanded, by the same court, to the said serjeant at mace, that he, according to the custom of the city, warn and make known to the said garnishee to be and appear here in this court to be holden, &c. on Saturday the 27th day of April, aforesaid, to show cause, &c. why the said plaintiff ought not to have execution of the said 570*l.* so attached in hands and custody as aforesaid: and that the said serjeant at mace return and certify, at the same court, what, &c. The same day is given, by the court, to the said plaintiff to be there, &c., at which said court, holden, &c. the said plaintiff by his said attorney appear: and the said serjeant at mace hath returned and certified, to the same court, that he, by virtue of the said precept to him directed and according to the custom, &c. had warned and made known to the said garnishee to be and appear at this same court to show cause, &c. above commanded, and thereupon, at the same court, the said garnishee was solemnly called and appeared, and appointed in his stead William Jones, his attorney, and hath leave to imparl until, &c.

“PLEA.—And the said Thomas Garland Murray, by William Jones, his attorney, on the 30th of April, in the year of the reign aforesaid, comes and [\*489] says that the said plaintiff ought not to have execution of the \*said 570*l.* in moneys numbered, so attached as aforesaid, or any part thereof, because he says that, at the making the attachment aforesaid, he had not owed to or detained, or yet hath, owes to or detains from the said Robert Hamilton, the defendant named in the bill original and attachment aforesaid, the said 570*l.* or any part thereof, in manner and form as the said plaintiff hath above

1827.—Holt v. Murray.

supposed, and of this he puts himself upon the country, and the said plaintiff doth the like, therefore, &c.

“Verdict for the plaintiff 570*l*.—Afterwards, to wit, on Tuesday, the 9th day of July, in the 56th year, &c. the jurors of the jury aforesaid being solemnly called, twelve of them, that is to say, Samuel Colson, &c. (here follow the names of the other jurors,) appeared, who being elected, tried and sworn upon the same jury, according to the custom of the said city, to declare the truth of and concerning the premises, and to try the issue joined between the said parties in the plea aforesaid, for their verdict, upon their oath say that, at the time of making the said attachment aforesaid, the said Thomas Garland Murray owed to and detained from the said Robert Hamilton, the defendant named in the bill original and attachment aforesaid, the sum of 570*l*. in moneys numbered, as the proper moneys of the said defendant in manner and form as the said plaintiff by his bill original and attachment aforesaid hath supposed. Therefore it is considered by the court that the aforesaid plaintiff have execution of the said 570*l*. in moneys numbered, so found by the jury as aforesaid, by pledges, &c., if the defendant, &c. and process for the remainder, &c.”

\*Mr. Rose, and Mr. Bolland, in support of the exceptions. A judg- [\*490] ment recovered in the lord mayor's court, is entitled to the same priority as a judgment recovered in any of the superior courts.(a) The only question is, whether the nature of this judgment is such as entitles it to be so classed, it being a judgment against the garnishee, and not against the defendant. There can be no doubt that a judgment in the mayor's court against the defendant, would entitle the debt to rank as a judgment debt. Holt brought an action against Hamilton. Hamilton being in contempt, Holt issued an attachment against Murray. Murray pleaded the only plea which a garnishee can plead, namely, *nil habet*; and judgment was had against him upon proof that he had money of the defendant's in his hands. It appears, from the wording of this judgment, that it does not differ from judgments of another description. Upon the cause being tried and execution issued, the goods and person of the garnishee may be taken, in the same manner as under an execution issued by any of the superior courts. Both executions, therefore, stand upon the same grounds, and give the same advantages. If the defendant, after the money has been taken out of the garnishee, chooses to purge his contempt, within a year and a day, by *scire facias*, he may do it; and the money will then be restored to the garnishee, or, if the execution is not gone, the attachment is dissolved. That was not done in this case. The judgment is final; and the operation of it is such as to put into the pocket of the plaintiff \*the money which he [\*491] has obtained in the court below. In *Bulmer v. Marshall*,(b) (which will be relied on for the defendants,) it was found that there were no assets within the city of London upon which the writ could operate; and, therefore, application was made to the court of king's bench for the plaintiff to have exe-

(a) Swinb. 7th edit. 827, note.

(b) 5 B. &amp; A. 821.

1827.—Holt v. Murray.

cution in Middlesex, under 19 Geo. 3, c. 70. That statute enables the court, when it is satisfied that there are not goods within the jurisdiction of the inferior court to satisfy the execution, to give the plaintiff a larger range to get the benefit of his judgment; and the question was, whether the proceeding by attachment, being by custom, came within the statute. The court thought that it would be going too far to extend the jurisdiction in the case before them, as it did not come within the words of the statute; but never alluded to the judgment not giving the plaintiff all the rights which the judgment of a superior court would give him. *Bulmer v. Marshall*, therefore, is no decision upon the present question. It decides only that, as the execution was obtained under a custom, it was not one which the courts of Westminster Hall could assist. There is no ground for saying that a judgment debt, although not within the 19 G. 4, c. 70, is not entitled to the same priority as other judgment debts are. If it had been found that the garnishee had goods in London, they might have been taken in execution. It is no prejudice to the rights of the plaintiff, to range this debt, before the master, in the higher class of debts. The judgment of all courts of record are entitled to the same rank as judgments of the superior courts. *Searle v. Lane*.(c)

[\*492] Mr. *Pepys* and Mr. *Pemberton*, for the defendant :—Whatever rule may be laid down in the books that have been cited, it does not apply to this case; as this debt cannot be entitled to rank as a judgment debt in the administration of the assets of this testator. He owed these parties no debt. The error of the master is different from that complained of. He ought not to have allowed it as any debt at all. The proceedings in the mayor's court show the nature of the demand. The object of the proceeding against *Murray*, was not to enforce payment of the debt, but to compel the defendant, by impounding his money, to submit to the jurisdiction of the court. The verdict does not give a right to the money. It makes no contract between the plaintiff and the garnishee. A year and a day are given to the defendant to come in and submit to the jurisdiction; and, if the defendant does come in within that time, he must give the garnishee sureties to return the money. In no respect, therefore, is the execution issued for satisfaction of the debt. *Bulmer v. Marshall* establishes that the court of king's bench refused the aid given by the act. And why did that court refuse to interfere? Because it did not consider the judgment to be a judgment of an inferior court, but merely a proceeding, for the recovery of a debt, between *Holt* and *Hamilton*, not between *Holt* and *Murray*. If it had been a judgment for the recovery of a debt, it would have fallen within the words of the act. *Wetter v. Rucker*.(d) establishes that the judgment does not constitute a demand between the plaintiff and

[\*493] the garnishee. The garnishee is not discharged from liability to his creditor, unless the money is paid over under the execution. It would be absurd, therefore, to hold that the judgment creates a debt between

(c) 2 Vern. 88.

(d) 1 Brod. &amp; Bing. 491.

1827.—*Barfield v. Nicholson.*

the plaintiff and the garnishee, but does not discharge the liability of the latter to the defendant. Here Holt has got nothing but judgment. He has not proceeded to execution, by which alone the money is given, and the garnishee discharged. No proceeding can be taken upon this judgment against property out of the jurisdiction of the court; therefore there can be no proceeding against the general assets of the deceased. Consequently this demand cannot be entitled to rank as a judgment debt against those assets.

Mr. *Rose*, in reply:—In *Macdaniel v. Hughes*,<sup>(c)</sup> it was decided that the garnishee, against whom a recovery was had, might avail himself of the proceedings in the mayor's court, in an action brought against him to recover the debt. Long before the answer was put in in this suit, the proceedings were completed in the court below, and the time, allowed to Hamilton to come in and submit to the jurisdiction, had expired. The courts have always paid respect to the records of other courts, however inferior they might be, and recognized the priority of the debt recovered in them. The judgment here is final. The decision in *Bulmer v. Marshall* was not founded upon the ground that the judgment was not final. That case decides, that the 19 Geo. 3. c. 70, intended to give assistance to courts of limited jurisdiction, but not in cases of foreign attachment.

\*The VICE-CHANCELLOR:—It is quite inconsistent with the principles of the administration of estates, to consider this as a judgment debt. As at present advised, I think that this plaintiff does not stand in the rank of a judgment creditor: but, as it is a question at law, I shall not refuse him a case, if he chooses to take one: but it must be at the peril of paying costs. *Wetter v. Rucker*, from the best consideration I have been able to give it, appears to be precisely in point.

The plaintiff declined to take a case for the opinion of a court of law, and the exception was overruled.[1]

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#### BARFIELD V. NICHOLSON.

1827; 4th July.—*Practice.—Restoring bill.*

Bill restored, though the order to dismiss was not obtained till after a considerable interval since the last proceeding in the cause, and though the plaintiff had acquiesced in the order; the suit being one in which the main object was answered when an injunction was obtained.

THE nature and objects of this suit, and the proceedings in it, prior to those after mentioned, will be seen on referring to 2 Sim. & Stu. 1.

Nicholson's answer was filed on 3d March, 1824, and Kelly's further answer, on the 31st January, 1824. On the 29th of November in that year, Nichol-

(c) 3 East, 367.

[1] Vide *Ullock v. Barber*, 6 Sim. 300.



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1827.—*Barfield v. Nicholson.*

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son filed a bill against Barfield to have the assignment of his copy-right in the *Architectural Dictionary* delivered up to be cancelled, as having been fraudulently obtained, and for relief consequential thereon. No proceedings having been taken in the former suit within the time limited by the rules of the court, the defendants, Nicholson and Kelly, on the 19th of May, 1827, obtained orders for dismissing the bill, as of course. Barfield now moved to discharge those orders.

[\*495] \*In support of the motion, two affidavits were filed by Barfield, and Mr. Wilks his solicitor, the former stating the object of the original suit, the proceedings therein, and the prayer of Nicholson's bill: that the latter suit was still in prosecution, and was in the nature of a cross bill, relating to the matters substantially at issue between the parties in the former suit: that, in 1825, Mr. C. Barber, the deponent's former solicitor, died, and, after his death, the papers in both causes were handed over to the deponent's present solicitor; but, as the deponent understood that his object in instituting the first suit had been substantially accomplished by the granting of the injunction, and that the real question at issue would be discussed, and determined by the proceedings in the second suit, and being desirous while the injunction continued in force, to abstain from all proceedings against the defendants that could be avoided, and which would create double expense, he instructed his present solicitor to take no proceedings for the immediate prosecution of the original suit: that, without any motion to dissolve the injunction, or any application to speed the cause, orders of dismissal had been obtained in the original suit: that the dismissal of the original suit would dissolve the injunction, and prejudice the important interests of the deponent, and therefore, he was advised that it was necessary to prosecute the original suit for the continuance of the injunction and the other purposes thereof: that his interest required protection in the same manner as when the bill was filed and the injunction granted: and that, if that bill were to stand dismissed, the deponent must renew the suit, which would produce additional litigation and serious expense to all parties.

[\*496] \*Mr. Wilk's affidavit stated that, when the papers were delivered to him, he questioned Barfield as to the proceedings that had been taken and were required to be adopted, on his behalf, in those suits; that Barfield thereupon informed the deponent that it was his desire that no further steps should be taken in the suit wherein he was plaintiff, while an injunction obtained therein continued in force, as he had been advised, by his deceased solicitor, that that injunction had really effected all the objects sought to be obtained, and that the question at issue in the second suit was substantially the same as in the first suit, and that, therefore, no further steps should be taken in the first suit.

It appeared, by the affidavits made in opposition to the motion, that the taxation of the costs, under the orders of dismissal, had been proceeded in by the solicitors of both parties, and was nearly completed.

1827.—*Mitchell v. Knott.*

Mr. *Heald*, Mr. *Sugden*, and Mr. *Roots* appeared in support of the motion, and relied on the facts stated in the affidavits on their side.

Mr. *Wakefield* opposed the motion, and urged the delay that had taken place in the first suit, and the acquiescence in the orders of dismissal, by Barfield's solicitor proceeding with the taxation of the costs; and, to show that the existence of the injunction did not affect the regularity of the orders, he cited *Day v. Snee*, (a) and *Hannam v. The South London Water-works Company*. (b)

\*The VICE-CHANCELLOR:—In cases of invasion of patent or copy- [\*497] right, where the substantial object of the suit is obtained when an injunction is granted, the plaintiff's solicitor acts judiciously towards his client, and mercifully towards the defendant, in abstaining from prosecuting the suit. I think, therefore, that for that reason, and considering all the circumstances of this case, and notwithstanding the acquiescence in the orders, this bill ought to be restored.

Motion granted.

### MITCHELL V. KNOTT.

1827; 17th July.—*Demurrer*.—*Equity*.

A bill in equity does not lie by the assignees of a bankrupt against a judgment creditor and the sheriff, for moneys levied under an execution upon a judgment by *nil dicit*.

THE plaintiffs were the assignees of John Cullen Knott, a bankrupt. The defendant, Knott, was the father of the bankrupt: and the other defendant was the then late sheriff of Kent. In September, 1822, J. C. Knott gave his father a warrant of attorney, to secure moneys which the father had advanced and made himself liable to, on the son's account. In September, 1826, judgment was entered up upon the warrant of attorney, and a *feri facias* issued, under which the sheriff proceeded to sell the son's goods and stock in trade, by retail. The son, having been arrested by two of his other creditors, rendered himself, in discharge of his bail, in January, 1827. On the 12th of February, the sheriff began to sell the remainder of the goods and stock in trade by auction. The sale lasted eleven days. On the 23d of that month, the commission issued.

\*The plaintiffs alleged, by their bill, that the judgment having been [\*498] obtained by confession or *nil dicit*, the father was not entitled to have the benefit of his execution against the general creditors of the son, and that the plaintiffs, as his assignees, were entitled to receive the moneys in the hands of the sheriff, arising by the sale, for distribution among the creditors under the commission; and that the father was entitled only to be paid rateably with the other creditors. (c) The bill prayed for a declaration to the effect of this

(a) 3 V. & B. 170.

(b) 2 Mer. 61.

(c) By 6 Geo. 4, c. 16, s. 108, it is enacted, "That no creditor having security for his debt or having made any attachment in London, or any other place by virtue of any custom there used,

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 1827.—*Hichens v. Congreve.*


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allegation ; for an account (if necessary) of the moneys received by the sheriff, and of what was due to the father at the son's bankruptcy ; and for injunctions to restrain the father from proceeding in the execution, and the sheriff from paying over the proceeds of the sale to the father. To this bill, the father put in a general demurrer.

Mr. *Knight*, in support of the demurrer, was beginning to open the pleadings ; when the Vice-Chancellor desired to hear the counsel in support of the bill.

[\*499] \*Mr. *Horne* and Mr. *Whitmarsh*, for the plaintiffs :—A suit in equity is the proper mode of obtaining the relief sought for. The bill proceeds upon the ground of preventing a multiplicity of suits. The case of *Taylor v. Taylor*,<sup>(b)</sup> shows that the judges were of opinion that, in a case like the present, there was no remedy at law. Besides, Knott, the father, laid by, and took no step to enforce his security for four years. The accounts prayed against the sheriff, and Knott, the father, are necessary, but could not be taken at law. If we had brought trover against the sheriff, we could not have got the money ; because the act does not declare the execution void.

The VICE-CHANCELLOR :—The late bankrupt act was intended to facilitate the administration of the bankrupt's estates, not to vary the rights of the creditors and assignees under particular circumstances. When the act declares that the fund shall be distributable, it means that the assignees shall recover and distribute it. The case of *Taylor v. Taylor* decides the very reverse of what it is cited for, namely, that the assignees have a remedy, either by petition or action, to possess themselves of the property to be distributed. Whenever an act gives a right, it means to give a legal remedy, and not to put the party to the extraordinary remedy of a court of equity.

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 [\*500]

\*HICHENS v. CONGREVE.

 1827 ; 18th July.—*Practice.—Amendment.*

A bill may be amended by adding plaintiffs, notwithstanding the defendants have answered it.

THE bill was filed by some of the shareholders in a mining company, on behalf of themselves and other, complaining of a fraudulent misapplication, by the directors, of part of the funds of the company, and seeking to have the

of the goods and chattels of the bankrupt, shall receive upon such security or attachment more than a rateable part of such debt, except in respect of any execution or extent served and levied by seizure upon, or any mortgage of or lien upon, any part of the property of such bankrupt before the bankruptcy ; provided that no creditor, though for a valuable consideration, who shall sue out execution upon any judgment obtained by default, confession, or *nil dicit*, shall avail himself of such execution to the prejudice of other fair creditors, but shall be paid rateably with such creditors."

(b) 5 B. & C. 392.

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 1827.—*Caddick v. Masson.*


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amount refunded. After two of the defendants had put in their answers, the bill was amended by adding plaintiffs.

Mr. *Heald*, Mr. *Twiss* and Mr. *Loftus Lowndes* now moved, on behalf of the defendants who had answered the bill, that the amended bill might be taken off the file, or the amendments be struck out. They said that defendants might be prejudiced by the adding of plaintiffs after they had answered the bill; inasmuch as they might have been able to defeat the original plaintiffs, and under that impression, might have made admissions which they would not have made if the additional parties had been plaintiffs originally, or might have qualified those admissions; that A. and B. might not be entitled to the relief sought, but A. B. and C. might; that, in this case, the new parties did not stand in the same situation as the old ones did, for the former were original shareholders, whereas the latter were merely purchasers from original shareholders, and the defendants might, therefore, be entrapped into not shaping their defence so as to meet the case set up by the new plaintiffs.

Mr. *Horne*, Mr. *Sugden* and Mr. *Pemberton*, appeared against the motion.

\*The VICE-CHANCELLOR :—It has been urged, in support of the mo- [\*501] tion, that, if these amendments are allowed to remain, injustice may be done to the defendants, because they may have admitted facts which they would have accompanied with explanation if the record had stood originally as it now does. But no injury can, from that state of circumstances, fall upon the defendants; for, after a bill is amended, a defendant has an opportunity of adding the explanatory circumstances in his answer to the amendments.

Motion refused, with costs.[1]

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#### CADDICK v. MASSON.

1827; 18th July.—*Practice.*—*Dismissal.*

Where there are two plaintiffs, and one of them only becomes bankrupt, the bill may be dismissed upon the usual motion.

THERE were two plaintiffs in this cause. After replication, one of them became bankrupt. No proceedings having been had in the cause for three terms,

[1] By the practice of the court of chancery of the state of New-York, a bill may be amended at any time after answer and before replication until the time for replying expires, without costs, if a new or further answer is not thereby rendered necessary, otherwise with costs. Sworn bills, except injunction bills, may be amended in the same, under certain restrictions. Rules and Orders, Rule 43. Where the objection of want of proper parties is made by the answer, the proper course for the complainant is to amend the bill, so as to bring the proper parties before the court before any further expense has been made in the cause. If he neglects to do this, it will rest in the discretion of the court at the hearing, to permit the cause to stand over, upon the payment of all such costs as he may have unnecessarily subjected the adverse party to by his neglect, for the purpose of enabling him to bring the proper parties before the court, or to dismiss the bill with costs. *Van Eppe v. Van Dusen*, 4 Paige, 75.

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 1827.—Lord v. Lord.
 

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the defendant obtained the usual order to dismiss the bill for want of prosecution. Mr. *Piggott*, for the bankrupt plaintiff, now moved to discharge that order for irregularity. He said that, when a plaintiff becomes bankrupt, the suit can not be dismissed upon the usual motion; but that a special application must be made that the assignees may file a supplemental bill within a certain time, or that the bill may be dismissed: and he cited *Randall v. Mumford*,<sup>(a)</sup> *Porter v. Cox*,<sup>(b)</sup> *Adamson v. Hall*,<sup>(c)</sup> and *Sharp v. Hultett*.<sup>(d)</sup>

[\*502] \*Mr. *Jacob*, for the defendant, said that the bankruptcy of a plaintiff was not an abatement of the suit, but only made it defective as to parties: that a defect of that nature did not prevent the suit being dismissed: that here there were two plaintiffs, one of whom was solvent, and that he might make the suit complete if he pleased.

The VICE-CHANCELLOR:—The rule laid down in the cases referred to, is confined to the case of a sole plaintiff, who, becoming bankrupt, is supposed to be negligent of what is sought by the bill; and the court, to prevent surprise and save expense, requires notice to be given to the assignees. There is no instance where the court has taken upon itself to interpose the rule, where there are two plaintiffs one of whom is solvent and the other insolvent; for it is as competent to the solvent plaintiff, as it is to the assignees to rectify the suit.

Motion refused without costs.

On the 19th of July, a motion similar to that in the last case, was made by Mr. *Wakefield* in *Latham v. Kenrick*, and opposed by Mr. *Matthews*: and was also refused by the Vice-Chancellor.

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 [\*503]

\*LORD v. LORD.

1827; 19th July.—*Practice*.—*Sale under decrees*.—*Vendor and purchaser*.

A purchaser for B., but without authority, an estate sold under a decree. B. died without adopting the purchase. The order *nisi* was nevertheless obtained. The court refused to order B.'s executors to pay the purchase money; and, on the heir declining the purchase, discharged the order *nisi*, and directed a re-sale.

If the executors of a purchaser under a decree refused to pay the purchase money, they cannot be compelled to pay it, unless a suit be instituted by the heir.

THE decree directed the real estates of a testatrix to be sold for payment of legacies given to the plaintiffs. Two of the lots were purchased by Sir Thomas Turton for Anne Buckner, but without her privity. She, however, had consulted him upon the management of her property, and had frequently expressed a desire to purchase those parts of the testatrix's estate which were

(a) 18 Vcs. 424.

(b) 5 Madd. 80.

(c) Turn. 258.

(d) 2 Sim. & Stu. 496.

1827.—Lord v. Lord.

contiguous to her own property, if they should ever be sold. He afterwards went to her house for the purpose of informing her of the purchase, but found her in such a state of mind as to be incapable of understanding matters of business; and consequently did not make any communication to her upon the subject. Mrs. Buckner continued in the same state until her death, which took place on the 24th of September, 1826. On the 6th of December following, the master reported Mrs. Buckner to be the purchaser of the two lots; and, on the 8th of that month, the report was, on a motion made by Eleonora Lord, one of the defendants, confirmed *nisi*. On the 15th of January, 1827, Eleonora Lord moved, before Sir John Leach, V. C. to confirm the report absolutely; but his Honor, having been told that Mrs. Buckner was dead, refused the motion. A motion was now made, by the same party, either that the co-heirs and executors of Mrs. Buckner or some or one of them, or Sir Thomas Turton, might be considered as the purchasers of the lots, and be ordered to pay the purchase money for the same, and that the order *nisi* might be discharged, or that those lots might be resold.

\*Mr. *Shadwell*, and Mr. *Stuart* appeared in support of the motion [\*504] And Mr. *Sidebottom*, for Henry Lord, one of the defendants.

Mr. *Whitmarsh*, for the plaintiffs, said that it appeared, by the affidavits, that Sir Thomas Turton had no instructions to make the purchase, and that Mrs. Buckner never adopted it; and that, therefore, he purchased on his own responsibility.

Mr. *Treslove*, for Mrs. Buckner's co-heirs, contended that all the proceedings, down to the order *nisi*, were regular: that Eleonora Lord ought to have proceeded to confirm the report absolutely, by a motion of course, and had no right to discharge the order *nisi*: that the co-heirs were entitled to the lots, and that the executors, on being served with notice, were bound to pay the purchase money.

The Vice-Chancellor: Suppose the executors were not to admit assets?

Mr. *Treslove*: The court would, nevertheless, order the report to be confirmed.

The Vice-Chancellor: I do not think that I should make such an order.

Mr. *Treslove*: This contract can not be the subject of a bill, as it was entered into with the court. Sales before a master are not within the statute of frauds; because the contract is made with the court, and not with an individual.

\*The VICE-CHANCELLOR:—The court cannot act upon a person who [\*505] is not a party on the record, unless he has come in and done some act which subjects him to the jurisdiction of the court.

The co-heirs are entitled to purchase these lots if they choose, and have an equity to compel the executors to reimburse them, if they have assets. But if the co-heirs do not choose to complete the purchase, let the order *nisi* be discharged, and the master proceed to a resale; and reserve the consideration as

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 1827.—*Jackson v. Parish.*


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to any deficiency that may arise on the resale, and by whom the costs of it are to be repaid.

Mr. *Treslove* having declined the purchase on behalf of the co-heirs, the order for a resale was made in the terms before mentioned.

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### JACKSON v. PARISH.

1827; 19th July and 19th August.—*Practice.*—*Supplemental answer.*

Leave given, after replication, to file a supplemental answer to a bill for dower, in order to state a fine and non-claim which had been omitted, through ignorance, in the original answer.

THE bill was filed, in February, 1826, by Mary, the widow of James Jackson, to have dower assigned to her out of certain messuages, which had been conveyed to the defendant by Edward Rider, who derived title thereto through conveyances made by James Jackson. The defendant, in his answer, which was filed in May, 1826, admitted that he intended to dispute the plaintiff's title to dower; and that the title deeds of the estate were in his possession; and he set forth a list of them in a schedule; but the schedule did not contain any notice of the fine after mentioned. After the answer had been replied [\*506] to, and witnesses examined \*for the plaintiff, the defendant moved for liberty to file a supplemental answer, for the purpose of stating and putting in issue, a fine with proclamations levied, by Edward Rider and Ann his wife, to the defendant, in Michaelmas term, 60th Geo. 3, of the messuages in question, and of insisting upon the benefit of the fine and the non-claim thereon; and that, if necessary, the replication might be withdrawn, or taken as a replication also to the supplemental answer; the defendant submitting, in either case, that it should be without prejudice to the depositions already filed on behalf of the plaintiff, or to her filing further depositions, if she should be so advised.

The defendant, in an affidavit in support of the motion, deposed that he had in the second schedule to his answer set forth a full and true list of all the title deeds, muniments, papers and writings, relative to the messuages, tenements and premises, which then or ever were in his possession, custody or power, and which were delivered to him upon the occasion of his purchase of the said premises, and that the same did not contain any chirograph, or indentures of fine levied by Edward Rider and Ann his wife, of whom he purchased the premises, nor had he any such delivered to him at the time of his purchase, nor was he aware of the same, or that any such ought to have been delivered to him, or of the nature or effect thereof upon the plaintiff's claim.

The defendant's solicitor also made an affidavit, in which he deposed that he was not professionally employed by the defendant upon the occasion of [\*507] his purchase of the messuages or dwelling-houses in question \*in the cause, and had no knowledge of the defendant's title thereto until he was

1827.—*Jackson v. Parish.*

instructed to prepare the answer of the defendant : and that, upon that occasion, he applied to the defendant for the title deeds in his possession relating thereto, and received from him an abstract of the title, together with the two bonds set forth in the second schedule to the defendant's answer ; but that the several other deeds, papers and writings mentioned in the said schedule, were not delivered to him, nor seen by him, until after the answer was prepared, when the dates of the deeds, and the names of the parties thereto, were added to the schedule : that the answer of the defendant was prepared from the said abstract, in which no notice was taken of the fine in question ; and that he had not, at the time of filing the answer, any knowledge or belief that such a fine had been levied ; and that he was wholly ignorant of the fact of such fine having been levied, until on or about the 21st of April, 1827, when he accidentally discovered the same ; that, in consequence of his ignorance of the said fine having been levied, the same and the benefit thereof was omitted to be insisted upon in the answer of the defendant, or to be pleaded in bar to the claim of the plaintiff.

Mr. *Pepys* and Mr. *Knight* appeared in support of the motion. They cited *Patterson v. Slaughter*,<sup>(a)</sup> and *Barrington v. O'Brien*.<sup>(b)</sup>

Mr. *Shadwell* and Mr. *Swanston* opposed the motion. If a party applies for leave to put in a supplemental answer, he must show, not only that the facts came \*to his knowledge after the first answer was filed, but [\*508] that he could not, by any diligence, have discovered them ; or, the allegation which he wishes to add, must be against his interest. The effect of allowing the additional fact to be stated in this case, would completely alter the plaintiff's rights : for, as the record now stands, she is clearly entitled to relief. After publication has passed, a plaintiff cannot file a bill of review, neither can he file a supplemental answer. *Curling v. Marquis Townshend* ;<sup>(c)</sup> *Livesey v. Wilson* ;<sup>(d)</sup> *Edwards v. M'Leay* ;<sup>(e)</sup> *Const v. Barr* ;<sup>(f)</sup> *Bingham v. Dawson* ;<sup>(g)</sup> and Lord Bacon's rule as stated in *Patterson v. Slaughter*.<sup>(h)</sup>

Mr. *Pepys*, in reply :—There is no similarity between giving leave to file a bill of review, and to file a supplemental answer. A supplemental answer is merely to put a new fact in issue : the object of filing a bill of review is to mend a case by new evidence, and, for that reason, such a bill cannot be filed after publication. *Patterson v. Slaughter* most nearly resembles this case ; and there Lord Hardwicke granted the permission. Here there is no danger of perjury. In *Const v. Barr* the defendant had admitted the plaintiff's title. In *Livesey v. Wilson*, the party, having admitted a fact, desired to qualify it. These cases are wholly beside the present question. We are desirous only to put in issue a new fact, which, if proved, will be a legal bar to the plaintiff's claim ; and, if leave be refused us, the plaintiff will get our property.

\*The VICE-CHANCELLOR :—The question is, whether a defendant [\*509] who has omitted, in consequence of the neglect of his solicitor, to put

(a) Amb. 292.

(b) 2 Ball & Beatt. 140.

(c) 19 Ves. 628.

(d) 1 V. & B. 149.

(e) 3 V. & B. 256.

(f) 2 Mer. 57.

(g) Jacob's Rep. 242.

(h) Amb. 292.



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 1827.—*Munnings v. Adamson.*


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a good defence upon the record, is to be allowed the benefit of it, by filing a supplemental answer. I will look into the cases that have been cited before I finally dispose of this motion. But I am quite sure that, before publication had passed, it would have been competent to the defendant to file a bill, stating that he was a purchaser for valuable consideration, and that a fine had been levied to him more than five years ago; and, that upon a bill for dower having been filed against him, under an elder title, he laid all his papers before his solicitor to make a defence, and that the solicitor omitted to set up the fine and non-claim, and to pray that he might be at liberty to put the fine and non-claim in issue.

12th August.—The VICE-CHANCELLOR:—In this case, I think the defendant must have liberty to put in a supplement answer, but the replication must stand as a replication to the supplemental answer, and without prejudice to the depositions taken; and the plaintiff is to be at liberty to go into any proofs to controvert the facts of non-claim, without amending the bill to put those facts in issue. The defendant must also pay the costs of this application, and caused by and incident to the putting in such supplemental answer.[1]

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[\*510]

\*MUNNINGS V. ADAMSON.

1827; 19th July.—*Practice.—Injunction.*

Motion to extend the common injunction, granted, where the answer, which was filed on the same morning, was insufficient, and the trial was coming on the next day but one.

MOTION to extend the common injunction to stay a trial that was coming on, on the next day but one. The answer was filed on the morning of the day on which the motion was made.

The Vice-Chancellor said that, as the motion was made too late, he would not grant it, unless the answer was insufficient.

His Honor, having read the answer, said that it was insufficient, and made the order.

[1] A supplemental answer was allowed to be filed to correct a mistake sworn to have arisen on the engrossment of the answer, and not discovered until after it was filed, and to supply an omission of the solicitor to make a certain schedule, a substantive part of the answer: but, says the Chancellor, "there can be no doubt that the application ought to be narrowly and closely inspected, and a just and necessary case clearly made out." *Bowen v. Cross*, 4 Johns. Ch. Rep. 375. The defendant who was an attorney, by his answer admitted that he had certain documents in his possession, and by a supplemental answer wished to retract the admission, but permission to file a supplemental answer was refused, the Vice-Chancellor observing that this case stood in a different situation from those in which it was allowed; for in most of those cases, the statement proposed to be made was supported by written documents, so that there could be no doubt of its truth; but this case was directly the reverse; besides, the defendant must have been aware of the consequences of making the admissions, which he sought to contradict. *Greenwood v. Atkinson*, 4 Sim. 29. And see further, 1 Hoff. Ch. Pr. 241 to 244. *Pedmore v. Skipwith*, 2 Sim. 565.

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1827.—*Handley v. Billinge.*

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Mr. *Horne* and Mr. *Lynch* moved; Mr. *Teed* opposed, and cited *Whitehouse v. Hickman*.(a)

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DANDO V. DANDO.

1827; 20th July.—*Practice.—Residue.*

If an executor admits that all the testator's debts, &c., have been paid, the court will, on motion, order the income of a balance, paid in by the executor, to be paid to the person entitled to the residue.

THE suit was instituted to carry into effect the will of a testator, who died in 1817, having bequeathed his personal estate to trustees, in trust, to convert it into money, to lay out the proceeds on government or real securities, and to pay the income to the plaintiff, his widow, for life. The executor admitted, in his answer, that all the testator's debts and funeral expenses had been paid; and a balance, which he had paid in, under an order of the court had been laid out.

\*Mr. *Koe*, for the plaintiff now moved that the dividends then accrued [\*511] due, and thereafter to accrue due, on the stock purchased with the balance, might be paid to her.

The VICE-CHANCELLOR:—If an executor admits assets, he does it at his peril; and, therefore, I shall make the order as prayed.

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HANDLEY V. BILLINGE.

1827; 20th July.—*Practice.—Depositions.*

Practice as to publishing depositions of witnesses examined after decree.

UPON an inquiry directed by the decree, a witness had been examined before the examiner.

Mr. *Barber*, for some of the defendants, now moved that the depositions of this witness might be forthwith published. He produced a certificate, signed by Mr. *Baines*, Mr. *Jackson*, and Mr. *Mills*, three of the clerks in court, to the following effect:—"We humbly certify that, in the case of the examination of witnesses after a decree, such witnesses having been examined either by commission, or before the examiner, the publication of the depositions is passed by order of the court, unless the publication be passed by the respective clerks in court signing a consent to pass publication, in the six clerks rule-book. But, in the examination of the witness by the master personally, a circumstance rarely occurring, the publication is by warrant granted by the master."

The Vice-Chancellor ordered the depositions to be published accordingly.

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1827.—Davenport v. Davenport.

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[\*512]

\*DAVENPORT v. DAVENPORT.

1827; 20th July.—*Practice.—Account.*

Where the usual decree for accounts against a personal representative has been taken upon motion, the master ought to require the vouchers to be produced, although the answer is not replied to.

THIS was a bill, against an administratrix, for the usual accounts. The usual decree had been made, by consent, upon motion. The answer not being replied to, the master held that it must be taken to be true as to the accounts and refused to require the vouchers to be produced.

Mr. *Bellasis*, for the plaintiff, now moved for liberty to file a replication *nunc pro tunc*, or that the master might be ordered to proceed as if a replication had been filed in due time; and cited *Mosely*, 296.

The Vice-Chancellor refused the motion, but said that the master would miscarry if he did not require the vouchers to be produced.

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WOOLMORE v. BURROWS.

1827; 21st July, and 29th Oct.—*Executory trust.—Will.—Construction.*

A trust, created by will, to purchase land, to be added and closely entailed to testator's family estate in the possession of T. B., testator declaring that his object was to have a head to the family, and that if T. B. should die without male issue, or dispose of the family estate, the residue of his fortune should go to A. B., or his nearest relative in the male line; how to be executed.

THE will of Robert Burrows, Esq. deceased, dated 13th August 1817, after giving several pecuniary legacies, concluded as follows: "The residue of my fortune to be laid out in land as contiguous as practicable to Stradone, in the county of Cavan, Ireland, to be added, and closely entailed to the family

[\*513] estate now in the \*possession of my relative Thomas Burrows; until such purchase is made, to allow Thomas Burrows, or his lawful heir, two and a half per cent on the amount of the said residue. I appoint Thomas Burrows, of Stradone, Arnold Burrows, son of Colonel Thomas Burrows, and my good and worthy friend, John Woolmore, my executors; and I leave to each of them 500*l.*"

The testator made a codicil, dated 13th August, 1818, in the following words; "My object in wishing to improve the Stradone estate, is to have a head to the family, who I hope will be kind and attentive to the different branches. Should Thomas Burrows die without leaving male issue, or dispose of Stradone out of the family line, it is my desire that the residue of my fortune should go to Arnold Burrows, son of Colonel Thomas Burrows, of Hill-street, or to his nearest relative in the male line."

The testator died in February, 1819.

A bill having been filed, by John Woolmore, against Thomas Burrows, and Robert and Honora Burrows, two of his children, the former of whom was

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1827.—*Woolmore v. Burrows.*

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born in the testator's life-time, and against Arnold Robinson Burrows and Jane Freeman, widow, and Eleanor Burrows, the testator's sisters and only next of kin, to have the trusts of the will carried into execution, and the rights and interests of the parties in the personal estate ascertained and declared, it was ordered, by the decree made on the hearing of the cause, that the master should inquire what estate at Stradone was meant, by the testator, by the description of the Stradone estate in the county of Cavan, Ireland, and \*whether such estate was subject to any and what entail, and when and [\*514] by whom created, and to what estates, and upon what trusts the same estate was limited, and who was or were entitled thereto, and to what estate or estates : and that the master should inquire whether the estate, stated in the answer of the defendant, Thomas Burrows, to have been agreed to be purchased by him, was a proper estate in which to invest part of the residue of the testator's estate according to the intention of the testator, as expressed in his will : and it was also ordered that the master should inquire who was the person intended, by the testator, by the description of Arnold Burrows, son of Colonel Thomas Burrows, of Hill street.

The master reported that, by indentures of lease and release, dated the 2d and 3d of October, 1807, being the settlement on the marriage of the defendant, Thomas Burrows, with Susan Seward, Robert Burrows (who was the father of the defendant, Thomas Burrows, but who died in the testator's life-time,) and the defendant, Thomas Burrows, conveyed certain lands, &c. which the master afterwards reported that the testator meant by the description of his Stradone estate, to the use of Robert Burrows, in fee, until the marriage, and, after the marriage (subject to two trust terms of 300 years and 350 years, and to three rent charges of 500*l.*, one for the benefit of Thomas Burrows during the lives of Robert and Thomas Burrows, and the two others for the jointures of Susan Seward and Sophia, the wife of Robert Burrows) to the use of Robert Burrows, and his assigns, for life, without impeachment of waste, with remainder to trustees to preserve contingent remainders, with remainder to the \*use of Thomas Burrows and his assigns, for life, [\*515] without impeachment of waste, with remainder to the same trustees to preserve contingent remainders, with remainder to the use of the first son of Thomas Burrows, in tail male, with remainders to the second, third, fourth, and every other son of Thomas Burrows, successively, in tail male, with remainder to the daughters of the marriage, as tenants in common in tail, with cross remainders between or amongst them in tail, and, in case there should be but one such daughter, with remainder to such only daughter in tail, with remainder to Robert Burrows in fee. The trusts of the term of 300 years were to raise 5,000*l.* of which 1,500*l.* were to be applied for the portions of the younger children of Robert Burrows and Sophia his wife, and the remainder towards payment of certain debts of Robert Burrows, and the surplus (if any) was to be paid to Robert Burrows. The term of 350 years was created for securing the three rent-charges of 500*l.*, and, after the decease of Thomas Bur-

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1827.—*Woolmore v. Burrows.*

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rows, to raise 2,400*l.* for the portions of the younger children of the marriage. And powers were given to Thomas Burrows to jointure an after-taken wife to the amount of 300*l.*, and for Robert Burrows and Thomas Burrows to charge the estates with 3,000*l.* each, and for Robert Burrows, during his life, and, after his decease, for Thomas Burrows, to grant leases of the estates, for lives, or thirty-one years.

The master found that the estates at Stradone were subject to the entail created by the settlement, and were limited to such uses, and upon such trusts, and subject to such powers, provisoes, limitations and agreements as were therein mentioned; and that Thomas Burrows was entitled thereto, as [\*516] tenant for life, by \*virtue of the settlement, with remainder to his first and other sons in tail male, with remainder to his daughters, as tenants in common in tail, with cross remainders between them in tail, with the ultimate remainder to Thomas Burrows in fee.

And the master also found that the estate, stated in the answer of the defendant Thomas Burrows to have been agreed to be purchased by him, was a proper estate in which to invest part of the residue of the testator's estate, according to the intention of the testator as expressed in his will. And he found that the defendant A. R. Burrows was the person intended by the testator by the description of Arnold Burrows, son of Colonel Thomas Burrows, of Hill street.

Thomas Burrows, having afterwards made another purchase, and the master having approved of it, it was referred to the master, by the decree on further directions, to settle a proper settlement of the estates, already purchased and thereafter to be purchased, with the testator's residuary estate, upon the uses and trusts, and according to the directions expressed and declared concerning the same in and by the said will and codicil. And the court declared that the defendant A. R. Burrows, was the person intended by the testator by the description of A. Burrows, son of Colonel T. Burrows, of Hill street.

Two drafts of a settlement having been brought in before the master, one on the part of the defendant Thomas Burrows, and the other on the part of the defendant Arnold Robinson Burrows, the master rejected the [\*517] former, and made certain alterations and additions \*to the latter, and certified to the court that he had approved of the last mentioned draft, with such alterations, as a proper draft or settlement of the estates already purchased and thereafter to be purchased.

By that settlement, those estates were limited to the defendant Thomas Burrows for life, without impeachment of waste with remainder to trustees to preserve contingent remainders, with remainders to Robert Burrows, the son of Thomas Burrows, (who was born in the testator's life-time,) for life, without impeachment of waste, with remainders to trustees to preserve, &c., with remainders to the sons of that Robert Burrows, successively, in tail male, with remainder to James Edward Burrows, (another son of the defendant Robert

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Burrows, (a) who had been recently born,) in tail male, with remainders to every other son of the defendant Robert Burrows, successively, in tail male, with remainder to Arnold Robinson Burrows, for life, with remainder to trustees to preserve, &c., with remainder to the sons of A. R. Burrows, successively, in tail male, with remainder to William Nesbit Burrows, son of the said Colonel Thomas Burrows, for life, without impeachment of waste, with remainder to trustees, &c., with remainders to the first and other sons of William Nesbit Burrows, successively, in tail male, with remainder to the heirs male of the body of (b)

Burrows, grandfather of Arnold Robinson Burrows, with remainder to the heirs male of the body of (b) Burrows, great grandfather of A. R. Burrows, with \*remainder to A. R. [\*518] Burrows, in fee. And the settlement contained a power to the defendant Thomas Burrows, during his life, and after his decease, for the person entitled to the first estate of freehold or inheritance, to lease the premises either for three lives or for thirty-one years.

To this report exceptions were filed on behalf of the defendants Thomas Burrows and Robert Burrows, his son, and also on behalf of Arnold Robinson Burrows. The exceptions taken by the defendant A. R. Burrows, were that the master had not inserted any clause for limiting the estates, purchased and to be purchased, to him in the event of Thomas Burrows disposing of the Stradone estate from his male line: whereas the draft settlement ought to have contained a clause for limiting the estates to him and his heirs, or the heirs of his body, or to him for life, with remainder to his first and other sons in tail male, in the event of Thomas Burrows concurring in any act whereby the entail of the Stradone estates, in the male line, might be barred: and that an estate for life only was limited to the exceptant: whereas, the estates ought to have been limited to him in fee simple, or otherwise in tail male; or, if an estate for life, with remainder to his first and other sons, ought to have been limited to him, by the settlement, then the immediate remainder in fee, on failure of his issue male, ought to have been limited to him.

The exceptions taken by the defendants Thomas Burrows and Robert Burrows, were that the master had not limited the estates to be purchased according to the testator's intention; it having been the testator's declared intention that the estates to be purchased and \*settled should be added [\*519] and closely entailed to the Stradone estate, which was the family estate: and that the master had certified that he had rejected a draft of a settlement brought in before him by the defendant Thomas Burrows: whereas the master ought not to have rejected the said draft, but ought to have adopted and approved the limitations therein proposed of the estates to be settled according to the will and codicil of the testator: and that the

(a) It did not appear, from the papers with which the reporter was furnished, that this son was made a party to the suit.

(b) Blanks were left for these names in the draft.

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master had, by the draft of the settlement which he had approved, limited to the defendant, Robert Burrows, the eldest son of the defendant Thomas Burrows, an estate for life only, with remainder to his first and other sons in tail male: whereas the master ought to have given an estate in tail general, or in tail male, to the defendant Robert Burrows, and not an estate for life only: and that the master had, in failure of issue male of the defendant Thomas Burrows, wholly excluded the daughters of the said defendant from any succession to the estates; whereas the master ought not to have approved of a draft of any settlement by which the daughters of the defendant Thomas Burrows were excluded: but, he ought, on failure of issue male of the defendant Thomas Burrows, to have limited the estates to the daughters, as tenants in common in tail, with cross remainders between or amongst them; and ought to have limited the ultimate reversion or remainder in fee of the estates, after the limitation to the issue male and female of the defendant Thomas Burrows, to the defendant Thomas Burrows, as the heir at law.

[\*520] \*Mr. Sugden, and Mr. Pemberton, for Arnold Robinson Burrows:—

The question is: what is the true construction of the will and codicil? The estate referred to by the testator was settled in strict settlement; but it certainly was limited to the daughters as tenants in common in tail. It cannot be denied that, in the will, there was no exclusion of any issue of Thomas Burrows. But the codicil puts an end to all doubt upon the subject; for it is quite clear that the testator could not mean a female head to the family; and the estate was to go over if Thomas Burrows died without male issue: and, when an estate is directed to go over in default of male issue, the issue female can not take. 'The male line alone can be included in the limitations. A son of a daughter can not be included, because, if he is to take, his mother must take before him, which she could not do, as the estate was to go over only on the extinction of male issue..

The next direction in the codicil is: "Should Thomas Burrows die without having male issue, or dispose of Stradone out of the family line, it is my desire that the residue of my fortune should go to A. Burrows, son of Colonel Thomas Burrows, of Hill street, or to his nearest relative in the male line." The master has rejected every word of this direction. It is true that a tenant in tail can not be prevented from suffering a recovery: but an estate may be settled so as to shift on his doing any act to prevent the estate going in the line in which it is settled. The master should have given effect to this direction, by inserting a clause for shifting the estate.

The next question is, whether Robert Burrows should have an [\*521] estate tail, or for life only. Now the testator \*directs the estate to be closely entailed. Robert was born in the testator's life-time. He might, therefore, have been made tenant for life, with remainder to his first and other sons in tail. *Humberston v. Humberston*(b) is an authority for this limitation.

(b) 1 P. W. 339, last edition, where the cases are collected down to the present time.

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The only other exception relates to the ultimate limitation in fee. The testator directs that, when the estate goes over, the residue of his fortune should go to Arnold Burrows, or his (that is Arnold Burrows') nearest relative in the male line. That passes the reversion in fee. It is clear that it must remain in Arnold Burrows, or his nearest relative in the male line. We contend, therefore, that the master ought to have given him a remainder in fee, expectant upon the failure of his issue male.

Mr. *Pepys*, and Mr. *R. Roupell*, for the son of Thomas Burrows, who was born after the testator's death, contended that the clause of forfeiture was nugatory, as it was intended to guard against what could not happen, as Thomas Burrows could not dispose of the Stradone estate, and therefore that clause was not to be extended to an act of a son of Thomas Burrows.

Mr. *Horne*, and Mr. *Roupell*, for Thomas and Robert Burrows:—The estate to be purchased is to be a kind of accessory to the Stradone estate. There is to be no separation between them. The new estate must have precisely the same limitations as the old one, or else it will not \*be [\*522] an addition to that estate. Upon this point the will is clear. Is any alteration in this respect made by the codicil? That instrument contains no devise, nor any new course of limitation, but was made under an erroneous impression that Thomas Burrows (who was tenant for life of the Stradone estate) was tenant in tail of it. This is evident, by the testator supposing that Thomas Burrows could dispose of the Stradone estate. If he has mistaken the limitations of that estate, it does not alter the general purpose expressed in the will. The codicil is so inaccurate that the court cannot act upon it. The only safe course is to take the settlement of the Stradone estate as a guide. If an estate for life in the new estate is to be given to Robert Burrows, the two estates may be separated; as Thomas Burrows, being tenant in tail of the Stradone estate, may bar the entail of it.

Mr. *Rose*, and Mr. *Knapp*, for Robert and Honora Burrows, two of the children of Thomas Burrows:—Under the settlement of the Stradone estate, Robert Burrows is the first tenant in tail, and must take a similar estate under the true construction of the will. Under that clause which relates to Thomas Burrows, or his lawful heir, the whole inheritance would vest in him. But this clause is qualified by the direction that the new estate is to be added and closely entailed to the Stradone estate. The testator, therefore, declares it to be his intention to connect the two estates. Now how are these words controlled by the codicil, so as to exclude the daughter of Thomas Burrows. The expression "head to a family," is not an exclusion of a female head. The words, "closely entailed," have reference to the existing settlement, which includes daughters as \*well as sons. The kindness to the [\*523] different branches of the family is not confined to males only. It is impossible to deny that the general intention of the testator is to keep the new estate consolidated with the Stradone estate. He never could intend that the eldest son should have an estate for life only, and that his younger brother



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should have an estate tail. The general gift of the inheritance to Thomas Burrows, is so far qualified as to let in the limitations of the settlement, and no farther : both male and female descendants, therefore, should be included. *Blackburn v. Stables*, (c) *Jervoise v. D. of Northumberland*. (d)

The clause of forfeiture, like all other clauses of the same nature, must be construed strictly.

Mr. *Sugden*, in reply :—It has been said that Thomas Burrows had no power to defeat the limitations of the Stradone estate. I admit that he had no power to do it, by himself ; but he had that power by joining with the tenant in tail. Nobody but Thomas Burrows can defeat those limitations in his life-time. A base fee, indeed, may be created, but still all the remainders would take effect.

Then, as to whether Thomas Burrows is to be tenant for life, or tenant in tail. When the testator says that he means to increase the Stradone estate, he intends to entail the new estate as closely as the law will allow him. The settlement of the Stradone estate is to be taken as a precedent at the time when it was made ; and, if so, Robert Burrows must be made tenant [\*524] \*for life. We have, in no respect, departed from the limitations of that settlement. The father and son were there made tenants for life ; and here also we make the father and son tenants for life. Our limitations, regard being had to existing circumstances, are precisely the same as those of the settlement referred to. It was observed in *Perrin v. Blake*, (e) that, under a limitation to A. and the heirs of his body, A. takes first an estate for life, and then an estate tail. Now under our limitation Robert Burrows will take an estate for life ; and he has an estate for life in the other estate also ; and, if he does not act to defeat the limitations of the settlement, both estates will go precisely to the same persons.

In *Blackburn v. Stables*, the question was whether one man should have an estate tail, or in strict settlement. *Leonard v. Earl of Sussex*, is a powerful authority for what we are contending for. (f) *Papillon v. Voice* (g) is the strongest case, upon the subject, that ever came before a court of justice. Who are closely to entail the estate ? Why the trustees who are to purchase it. The subject of the entail did not exist when the testator died ; and the trustees must conform to the rule of the court. Where there is an intention to entail strictly, all persons born in the life-time of the testator, must be made tenants for life. As to the second son being made tenant in tail, the testator, had he known that that must be the case, would only have regretted that all the sons could [\*525] not be made tenants for life. If the daughters are included, the \*estate will not go over if Thomas Burrows dies without male issue.

The VICE-CHANCELLOR :—The plaintiff in this case is a mere trustee, and the object of the bill is to have the rights of the co-defendants declared by the court, in order that estates purchased in pursuance of the trusts of the testator's will and codicil, may be settled upon those trusts. The master was directed to

(c) 2 V. & B. 367. (d) 1 J. & W. 559. (e) 4 Burr. 2579. 1 Black. 672. Dougl. 329.  
(f) 2 Vern. 526. (g) 2 P. W. 471.

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settle a proper deed for that purpose ; and, under this direction, he had to exercise his own judgment upon the true construction of the will and codicil. Both parties are dissatisfied with his judgment, and have taken exceptions to the report. The defendants, Thomas and Robert Burrows, object that the limitations of the settlement in their favor, are not co-extensive with their rights, according to the true construction of the will and codicil. On the other hand, the defendant Arnold Burrows insists that those limitations are not sufficiently strict, and that the deed should contain what is termed a shifting clause, but what, in plain language, may be called a clause of forfeiture, by Thomas and all his issue, in case he should do, or concur in any act to alien the Stradone estate.

It often happens that the court is called on to expound a meaning and execute a purpose which the testator himself could not have explained in their detail ; and the court is then driven to the necessity of giving such directions as it conceives to be nearest to a probable and rational purpose in the testator's mind. The present case is of that class. I think it reasonably clear that the testator intended to continue the name \*and augment the [\*526] property of the family stock from which he sprang, and, for that purpose, added his own fortune to the family estate, and wished to keep them permanently united ; but he had no distinct idea of the detail through which his meaning could be executed. He knew that the defendant, Thomas Burrows, was in possession of the family estate, under an entail ; but he evidently was ignorant of the legal nature of an entail, and of the means by which it might be continued or destroyed. His will is in these words : " The residue of my fortune to be laid out in land as contiguous as possible to Stradone, in the county of Cavan, Ireland, to be added and closely entailed to the family estate now in the possession of my relative, Thomas Burrows. Until such purchase is made, to allow Thomas Burrows, or his lawful heir, two and a half per cent. on the amount of the said residue." And then he appoints that Thomas Burrows, the defendant Arnold Burrows, and the plaintiff, his executors. If his will had rested there, I think his purpose might have been executed without assuming great latitude of construction. The estates to be purchased must have been limited to every person who could take under the settlement. But the important words, " closely entailed," would require the limitations to be as strict as the rules of law would permit ; and every person *in esse* at the testator's death must have taken a life estate, and no more. If this exposition of the testator's meaning could be deemed conjectural, I think it would be a conjecture approaching more nearly to a rational construction of intention than any other which could be imputed. A year afterwards, he made a codicil, the intention of which evidently was to confine the limitations in favor of Thomas, to his issue male, and, at the \*same time, to prevent an alienation of [\*527] the Stradone estate. His words are : " My object in wishing to improve the Stradone estate, is to have a head to the family, who I hope will be kind and attentive to the different branches. Should Thomas Burrows die

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without having male issue, or dispose of Stradone out of the family line, it is my desire that the residue of my fortune should go to Arnold Burrows, son of Colonel Thomas Burrows, of Hill street, or his nearest relative in the male line." Under the united effect of the will and codicil, the master has framed limitations excluding the female issue of Thomas, and giving to him and Robert (his only issue *in esse* at this time) estates for life, with remainders, to their issue, respectively, in tail male. So far, I do not think the limitations imposed, by the master, on Thomas and his issue, are more strict than they ought to be: and there is one point in which I think the master ought to have fettered the power of Thomas to alienate the testator's estate more than he has done. As the limitations stand, Thomas, having the estate of freehold in possession, by joining with any tenant in tail, may bar the remainders, and alien the estate; which would be obviously inconsistent with the general intent of the testator. If the master had limited the first estate of freehold to trustees and their heirs, during the life of Thomas, in trust for him, (a course now frequently adopted in family settlements,) Thomas would be disabled, by any act during his life, to alien the estate; and so far the testator's estate would remain closely entailed. Such a limitation would effectuate the clear intention of the testator, of preventing an alienation of his own estate, which must be implied [\*528] to have been as much his object \*as preventing an alienation of the Stradone estate. I therefore think the limitations in favor of Thomas should be varied, by vesting the first estate of freehold in trustees during his life, in trust for him, without impeachment of waste; and the other limitations are proper.

On the part of Arnold, it was insisted that, under that member of the sentence in the codicil which provides against Thomas disposing of the Stradone estate out of the family line, the shifting clause I have adverted to ought to be introduced by way of proviso. It is not, however, the usage of a court of equity to inflict or enforce forfeitures. In giving effect to the executory directions of a will, the court will guard all rights by restrictions and covenants in the way of limitations: but, whether the clause insisted on should be called a forfeiture or a limitation over, is not material; for I have found no instance in which the court has gratuitously imposed a limitation, amounting to a forfeiture, against one man, for the act of another with whom he is not in privity. But, in the present case, such a proviso would be singularly absurd: the act of Thomas in alienating the Stradone estate, could, in no contingency, be injurious to Arnold or his issue; for they are not in that "family line" which could ever inherit the Stradone estate under the entail to which the testator alludes; and, on the contrary, the effect of such a clause would be to impose a forfeiture of the testator's estate on the issue of Thomas, as resulting from the construction of a codicil, the obvious object of which was to keep both the estates united and descendible to them.

[\*529] \*The next consideration is, what ought to be the limitations in failure of issue male of Thomas. The master has given an estate for life to

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 1827.—*Ferguson v. Tadman. Ruck v. Tadman.*


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Arnold and his brother, successively, with remainders to their issue in tail male, and with remainder to any future issue male of their father. So far I think the master is right: but, the question is, whether, under the words, "the residue of my fortune to go to Arnold or to his nearest relative in the male line," the limitations should be carried into the ascending line; the words, are, certainly, capable of being extended to the ascending line of ancestors indefinitely. But, if you once travel out of the descending line, I know of no particular stock at which the court ought to stop whilst the pedigree of the family affords subjects. I think it was reasonable, in failure of issue male of Arnold, to insert limitations in favor of his younger brother, and of any future issue male of his father: they are reasonably consistent with the words, "nearest relative in the male line." To that extent, therefore, I think the limitations of the settlement should remain as approved by the master, and that those to the ascending line should be expunged; and I think that the master has come to a fair and reasonable conclusion in limiting the remainder in fee to Arnold. With these variations, I think that the report of the master approving the settlement, must be confirmed.[1]

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 \*FERGUSON V. TADMAN. RUCK V. TADMAN.

[\*530]

1827; 23d July.—*Interest.—Vendor and purchaser.*

The amount of deterioration of an estate pending a suit for specific performance, having been ascertained by an issue, the purchaser was allowed it out of his purchase money, which he had paid into court under an order, with interest from the time when he paid in his money.

In May, 1818, Thomas Colyer, one of the defendants, purchased a farm, in Kent, of the plaintiffs. By one of the conditions of the sale, the purchaser was to be entitled to possession of the farm at Michaelmas, 1818. He accordingly attended there, on that day for the purpose of receiving the possession; but the defendants M. and L. Tadman, who were in possession, refused to quit. Colyer thereupon gave notice to the vendors, that he should require them to reimburse him any loss he might sustain in consequence of not receiving possession of the premises pursuant to the conditions of sale, or in respect of the deposit he had paid to the auctioneer, or the residue of the purchase money; and that he was ready to complete his purchase. The vendors having informed him that they were about to proceed against the Tadmans to compel them to deliver up the possession of the premises to him, he refrained from rescinding the agreement. In November, 1818; the vendors filed two bills, against Colyer, the Tadmans, and other persons, to enforce performance

[1] A. having a power of revocation and new appointment over an estate of which B., his heir, was tenant in tail, by his will directed the estate "to be attached to his title as closely as possible." Held, that the estate of B. and all other tenants in tail in *esse* at A.'s death, (being in the line of the title,) were abridged to estates for life only. *Lord Dorchester v. Earl of Effingham*, 3 Beav. 180, n.

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 1827.—*Ferguson v. Tadman. Ruck v. Tadman.*


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of the contract. In 1819, a receiver was appointed of the rents and profits of the property, in both suits. The causes were heard in December, 1821, when the usual inquiry as to title was directed to be made. The master having approved of the title, and the causes being set down for further directions, Colyer, in June, 1823, presented two petitions to the court, complaining that, [\*531] since Michaelmas, 1818, the estate had \*become much deteriorated in value, by mismanagement and neglect, and praying for an inquiry to ascertain the amount of such deterioration, and that he might be at liberty to deduct, out of the purchase money, what the master should find to be proper to be allowed him. By the decree on further directions, it was ordered that Colyer should pay his purchase money into court, on or before the 29th of September, 1822 : that the receiver should then deliver up to him the possession of the premises, and that all proper parties should join in conveying them to him ; and an inquiry was directed to ascertain to what extent the estate had been deteriorated since Michaelmas, 1818. Colyer paid his purchase money into court on the 27th of September, 1823, and was then let into possession of the property. The master found the deterioration to amount to 787*l.* 3*s.* 5*d.* The plaintiffs and the defendant Colyer both excepted to the report ; the former alleging that the premises had not been deteriorated at all, and the latter that they had been deteriorated to the extent of 1,656*l.* 9*s.* 8*d.* Upon the exceptions coming on to be heard, an issue was directed to be tried at the next spring assizes, in order to ascertain whether the premises were, upon the whole, in a worse state and condition at Michaelmas, 1823, than they were at Michaelmas, 1818, either by occasion of the buildings not having been kept in repair, or by reason of the lands having been used in an unhusbandlike and improper manner ; and, if they were, to what amount and value in the whole. The jury found that the property was in a worse state and condition, from the causes before mentioned, to the amount and value of 1,652*l.* Upon this finding, Colyer petitioned the court that the amount found by the verdict, with interest, [\*532] at 4*l.* per \*cent, from the day on which he paid in his purchase money, might be raised by sale of a competent part of the stock in which that money had been invested, and be paid to him, and that he might also be paid his costs incurred in the trial of the issue. The petition now came on to be heard.

Mr. *Heald* and Mr. *Parker*, for the petitioner, said that the jury had found that their client was entitled to the whole of the sum he had claimed, except 4*l.* ; and that he was entitled to interest on the amount of the verdict.

Mr. *Horne* and Mr. *Boteler*, for the plaintiffs, said that it appeared, from the order on further directions, that the damages were to be considered as separate from the purchase money ; because the court, without regarding the latter part of the petition that was then heard, ordered Colyer to pay in the whole of his purchase money, and referred it to the master to inquire as to the amount of the deterioration, without making any reservation as to whether it was to be deducted out of the purchase money ; that if that were to be the case, the prayer

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 1827.—*Sale v. Moore.*


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of the present petition was wrong, for the petitioner would then be entitled to so much stock as the 1,652*l.* would have purchased when the money was paid in, the funds being higher at that time than they were at present : that it was a mere question of damages, and, therefore, the court would not allow interest.

The VICE-CHANCELLOR :—The petitioner purchased the property in question, in 1818, and, in that year, possession ought to have been \*de- [\*533] livered to him. But the possession was detained until 1823. The purchaser alleged that, by the default of the vendors, the estate was worth less when he was about to take possession of it, than it was at the time of his purchase. The court then called on him to pay in his purchase money : and, if the court, when it directed the inquiry as to the amount of the deterioration, had been asked by the purchaser to make a special reservation as to the sum which the master should report him to be entitled to, such a reservation would have been made ; because the purchaser, to the extent of the deterioration, paid in his own money, and not the money of the vendors. It appeared that the purchaser insisted on 1,656*l.* as the sum he was entitled to : but the master was of opinion that 767*l.* was all that he ought to be allowed. Both parties excepted to the report ; and the jury have found that the purchaser was entitled to the full amount of what he demanded ; for the 4*l.* is not worth considering. Upon that verdict, if there had been that reservation, the court would have ordered the master to ascertain what proportion of the stock in which the purchase money had been laid out, the purchaser was entitled to.[1] But, as the party has shut out that question, the only point to be considered is, whether the purchaser is entitled to have his over-payment returned, with interest, at 4*l.* per cent. from the time it was made. I think it perfectly clear that he is entitled to have it so returned. As to the laying out of the money in the funds, the court can take no notice of that circumstance. The next matter to be considered, is the costs of the trial. This is not a question of conduct in which both parties are implicated ; but the vendor was bound to take care \*against this deterioration : and I should not make the purchaser the [\*534] allowance he is entitled to, if I made him pay the costs of the trial.[2]

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#### SALE v. MOORE.

1827; 23d July.—*Will.—Constructive trust.*

A testator having given an annuity to one of his next of kin, and expressed a reason for giving nothing to the others, gave the residue of his property to his wife, recommending to her and not doubting that she would consider his near relations, as he would have done if he had survived her : held that there was no trust for the next of kin, but that the wife took the residue absolutely.

EDWARD MOORE, clerk, made his will in the following words : “ I give and bequeath to my beloved wife, Mary Moore, all my worldly substance, of what

[1] *Vide* *Courtney v. Ferrers*, ante 137, 145, and note, *ibid*.

[2] *Vide* *King v. Bardeau*, 6 Johns. Ch. Rep. 38, 45. *Woodcock v. Bennet*, 1 Cow. 713.

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 1827.—*Sale v. Moore.*


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kind or nature soever, or wheresoever, upon trust for the following purposes : 1st, that she do pay all my just debts and funeral expenses ; also that she pay the sum of 100*l.* to the treasurer or assistant who call themselves the governors of the Salisbury Infirmary ; which sum I charge on my personal estate, and desire it may be applied to the charitable uses of the said society : also that she pay the sum of 50*l.* a year to my sister, Fanny Moore, of Rumsey, in the county of Hants, spinster, during her natural life : which sum I hereby charge on my personal estate : my brother being in affluent circumstances, and my eldest sister being already well provided for by me, will, I trust, be considered by them as a sufficient reason for my not leaving them any thing in this my will, as I could not do it without taking from my wife's property, who is more in need of it. The remainder of what I die possessed of, after the payment of the aforesaid debts and legacies, I leave to my dear wife aforesaid, recommending to her and not doubting, as she has no relations of her own family, [\*535] but that she will consider \*my near relations, should she survive me, as I should consider them myself in case I should survive her. And I hereby appoint my said wife sole executrix of this my will."

The testator died in 1812, leaving John Moore, Fanny Moore, and Mary Moore, his brother and sisters, his only next of kin.

Mary Moore, the testator's widow, by her will, dated in the year 1822, but which did not recite or in any manner refer to her late husband's will, gave legacies to the testator's brother and several other persons, and annuities to the sisters. She died shortly after the date of her will.

The bill was filed, by the the testatrix's executors, against the legatees and annuitants under her will. It alleged that Mary Moore and Fanny Moore, the testator's sisters, not only claimed the annuities given to them by the testatrix, but also to be entitled, together with John Moore, the testator's brother, to the whole of the property possessed by the testatrix, and formerly belonging to the testator ; and that they contended that she took only a life interest in such property under the testator's will, and that they were then entitled to the same, by virtue of the trust in that behalf created in the testator's will ; and that Mary Moore and Fanny Moore also claimed to be entitled to the annuities given them by the the testatrix. The bill prayed that the trusts of the wills of the testator and testatrix might be carried into execution under the decree [\*536] of the court. \*The defendants, John Moore and Fanny Moore, by their answer, submitted that, by the testator's will a trust was created, in favor of his next of kin, of the residue of his personal estate, subject to the life interest therein of the testatrix. The defendant Mary Moore, by her answer, claimed to be entitled to the annuities given to her by the wills of the testator and testatrix, and also, as one of the testator's next of kin, to a share of his personal estate given, as she submitted, by his will, to his near relations, after the decease of his wife, subject to a power of appointment, among such near relations, vested in the testator's widow, which, as the defendant submitted, the widow did not exercise.

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The master, in pursuance of a reference made to him by the decree, found that the defendants John Moore, Fanny Moore and Mary Moore were the only next of kin of the testator at the decease, both of the testatrix and of the testator.

The cause now came on to be heard for further directions.

Mr. *Heald*, and Mr. *Seymour*, for the plaintiffs :—The questions in this case are, first, whether, by the residuary clause in this will, a trust is created for the persons whom the testator designates as his near relations.

This clause does not come within the line of cases in which it has been held that implied or constructive trusts were created ; for the objects of the trusts, and the interests that those objects are to take, are not \*suffi- [\*537] ciently defined. The expression “ near relations,” is not definite, nor is the word “ consider” sufficiently explicit. If the testator had not made a bequest to his widow, he would have provided for his brother and sister ; and, if the court holds that the next of kin are meant by the words “ near relations,” it would not meet the testator’s intentions. In *Wright v. Atkyns*,(a) the words were much stronger, and yet the house of lords decided that no trust was created. Secondly, the testatrix has given legacies to all these next of kin, and has thereby complied with the testator’s recommendation. She has made these next of kin objects of her bounty ; and how can the court say that she has not considered them as the testator would have considered them ?

Mr. *Barber*, for some of the legatees under Mrs. Moore’s will :—There is no trust in this case. It would be strange to hold that the widow was a trustee for the testator’s brother and sisters, as the testator apologizes for not leaving any thing to two of them. All the cases upon the subject of constructive trusts decide that, if there is a discretion in the legatee, if he is to leave as much as he pleases, and no more, the bequest is absolute. *Wynne v. Hawkins*.(b) The testator does not desire his wife to leave the whole of his property to his near relations, but only says that she is to consider them. Could the court declare that the widow was, under this will, tenant for life only of the residue, when she \*was not to leave the whole of it [\*538] to her husband’s relations, but so much only as she thought proper.

*Malim v. Keighley*,(c) *Heneage v. Lord Andover*.(d)

The VICE-CHANCELLOR :—There is a further term of uncertainty in this will: the widow is to consider, the near relations of her husband, as he himself would have considered them had he survived her.

Mr. *Horne*, and Mr. *Knight*, for some of the other legatees under the testatrix’s will :—There is no medium between holding the widow’s interest in the residue, either a life interest, or an absolute one. If she can dispose of a

(a) See 1 Turn. 143. The appeal to the house of lords appears not to be reported.

(b) 1 Bro. C. C. 179.

(c) 2 Ves. J. 333.

(d) As this, though it is a case of considerable importance, has not been reported, a report of it is given at page 542, post



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shilling of it, there is no trust. The testator says, explicitly, that he leaves nothing to his brother and elder sister, and assigns, as a reason for it, that they were in affluent circumstances. Besides, she was to consider his near relations as he would have considered them. By what index was her bounty to be directed. The testator, too, calls the property his wife's property.

Mr. Rose, Mr. Wray, Mr. Blenman, and Mr. Hayter, appeared for the rest of the legatees, and relied on *Heneage v. Lord Andover*, *Pushman v. Fil-liter*,<sup>(e)</sup> *Sprange v. Barnard*,<sup>(f)</sup> *Tibbits v. Tibbits*,<sup>(g)</sup> and *Horwood v. West*.<sup>(h)</sup>

[\*539] \*Mr. Tinney, for the defendant Mary Moore :—This case turns on the construction of the word “consider.” It does not imply a power to exclude any one of the objects pointed out by the testator, but means that they should all be kept in view for their benefit. The whole fund is placed in the widow's hands, with a direction that, as to the whole, she is to consider her husband's near relations. “Consider,” means that she is to consider which of them wants more than another. She is to consider whether one is to take for life, or absolutely; and whether one is to have more or less than another. She must distribute it amongst the relations: but, as some were well provided for, the testator leaves the amount of the shares to his wife's discretion. The sense of the expression, “as I should consider them myself,” is, that the widow was to exercise consideration as the testator would have done, if he had not had her to provide for. The case of *Heneage v. Lord Andover* has been much relied on: but, in this will, there is no expression like the words “unfettered and unlimited,” which occurred in that case. *Parsons v. Baker*.<sup>(i)</sup>

Mr. Pemberton, for the defendants John Moore and Fanny Moore, the two other next of kin of the testator :—The construction which the court always puts upon the words “near relations,” is, “next of kin.”<sup>(k)</sup> The testator, in the commencement of his will, gives the whole of his property to his widow, upon trust. It is quite clear, therefore, that he did not mean to give

[\*540] it to her absolutely. He then begins to declare the \*trusts. Fanny Moore, one of his sisters, was in indigent circumstances, his brother and other sisters were affluent. He, therefore, makes an immediate provision for his sister Fanny; but defers his bounty, to his brother and other sisters, until the decease of his widow, when the reason for not making an immediate provision for them would cease. By the direction, given to the widow, to consider the testator's near relations as he would consider them, he meant to say: “place yourself in my situation, and dispose of my property to those to whom I have told you that I should dispose of it.” We have, therefore, in this case, both certain objects and certain subjects of trust. *Eade v. Eade*,<sup>(l)</sup> which was confirmed, on appeal, by Lord Eldon, C. The widow has not

(e) 3 Ves. 7. (f) 2 Bro. C. C. 585. (g) See 19 Ves. 664. (h) See 1 Sim & Stu. 389.

(i) 18 Ves. 476.

(k) *Brown v. Higge*, 5 Ves. 502.

(l) 5 Madd. 158.

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attempted to exercise the power which the testator gave her. She has indeed bequeathed legacies to his brother and sisters; but they are given out of her own property.

The VICE-CHANCELLOR:—There is no ground, in this case, on which a court of equity can imply a trust as to any part of the testator's family. The first case that construed words of recommendation into a command, made a will for the testator; for every one knows the distinction between them. The current of decisions, has, of late years, been against converting the legatee into a trustee.

Supposing that the words in this case would create a trust, those words are coupled with some degree of uncertainty. Who are the objects of the trust? Did the testator mean relations at his own death, or at his \*wife's [\*541] death? Did he mean that she should have the liberty of executing the trust the day after his death? Various other considerations might be introduced to show that the objects are uncertain. There is no ground for taking, from the widow, what the testator has not taken from her, but vested in her absolutely. The case of *Dawson v. Clark*, (m) is a strong authority to show that the court ought not to take away an absolute gift. He gives to her: "all his worldly substance, of what nature or kind soever and where-soever, upon trust for the following purposes:" he must, therefore, be intended to have all the purposes in his contemplation. He then says: "my brothers being in affluent circumstances, and my eldest sister being already well provided for, by me, will I trust, be considered by them as a sufficient reason for my not leaving them any thing in this my will." Is not this a conclusive indication that, in the preceding part of the will, he had pointed out every trust that he intended should fix upon the property. He then proceeds: "as I could not do it without taking from my wife's property, who is more in need of it." Why does he not take it from her? He might have made her tenant for life only. But he says that he takes nothing from her. Where then is the ground upon which a trust could attach? He then goes on: "the remainder of what I die possessed of, &c." Now the word "consider" is a relative term. How is she to consider them? As he would have done? How is the court to find out how he would have considered his relations?

The conclusion, therefore, that I come to, is that there is no trust created in this case: and, in the view that \*I have of it, I think that [\*542] there is nothing in the decided cases that I contravene.

Declare that the testatrix, Mary Moore, took the residue of the personal estate of the testator Edward Moore, under his will, not subject to any trust.[1]

(m) 15 Ves. 409.

[1] A testatrix by her will bequeathed all her personal estate to C, whom she appointed one of her executors, for his own use and benefit forever, *trusting and wholly confiding in his honor that he would act in strict conformity with her wishes.* Afterwards, on the same day, she executed a testamentary paper, which contained a list of a number of persons by name, and among others, the name of the person who was the sole next of kin, with the several sums to be given to them respectively, and subscribed it in her own hand-writing, "such is the wish of S. C." It was con-

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 1824.—*Meredith v. Heneage*.
 

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## IN THE HOUSE OF LORDS.

Between HENRIETTA ARABELLA MEREDITH and JOHN CALCRAFT, Appellants :  
and GEORGE HENEAGE, WALKER HENEAGE and others, Respondents.

Sess. 1824.—*Will*.—*Construction*.—*Trust*.

Testator, after giving his real and personal estates to his wife in fee, said that he had so given the same to her, unfettered and unlimited, in full confidence that, in her future disposition thereof, she would distinguish the heirs of his late father, by devising the whole of his estate, together and entire, to such of his father's heirs as she might think best deserved her preference: Held that no trust was created.

JOHN WALKER HENEAGE, Esq. made his will, dated the 17th of March, 1798, and, after charging his real estates with the payment of his debts, proceeded as follows:—"I give and devise all and singular my manors, capital and other messuages, farms, lands, rectories, advowsons, rents, tithes and hereditaments, situate, standing, lying and being, and arising in the several counties of Wilts, Berks, Somerset, and Middlesex, my shares in the New River water works, and the offices of chief usher of his majesty's court of exchequer, and proclinator and barrier of the court of common pleas at Westminster, [\*543] which I hold in fee simple, and the rights, \*fees, perquisites and emoluments to the said offices belonging; and all and singular other my real estates and hereditaments whatsoever, in Great Britain, with their and every of their rights, members, and appurtenances, and the reversion and reversions, remainder and remainders thereof, and of every part thereof, and all and singular my estate and interest therein, unto my dear wife, Arabella Walker Heneage, to hold the said lands, tenements and hereditaments, and all other my real estate hereinbefore particularly mentioned, and set forth, unto the said Arabella Walker Heneage, her heirs and assigns for ever. I give and bequeath unto the said Arabella Walker Heneage, all my personal estate whatsoever and where-soever, and of what nature or kind soever, to hold the same to her the said Arabella Walker Heneage, her executors, administrators or assigns for ever. And I earnestly recommend, to my said wife, the care and protection of my affectionate friend Arabella Anne Caroline Jenny Pigott, most heartily beseeching my said wife that she will permit and suffer the said Arabella Anne Caroline

tended that the residuum, after satisfying the specific bequests, was given to C. in trust for the next of kin; but it was held that C. took the residue for his own use absolutely; *Wood v. Cox*, 2 Myl. & Cr. 684, reversing the judgment of the Master of the Rolls, 1 Keen, 317. E. I. indorsed a promissory note for 2,000*l.*, and sent it to S. S. in a letter, whereby she gave the same to S. S. for her sole use and benefit, for the express purpose of enabling her to present to either branch of her family any portion of the interest or principal thereon, as she might consider most prudent; and in the event of the death of S. S., by that bequest she empowered her to dispose of the said sum of 2000*l.*, by will or deed, to those, or either branch of the family she might consider most deserving thereof: It was held, that this letter created a trust, the objects of which were too undefined to enable the court to execute it; *Stubbs v. Sargon*, 1 Keen, 225. See further, *Knight v. Knight*, 3 Beav. 148, where the subject of precatory words in a will is fully discussed. Extracts from that case will be found in a note of the American editor to *Herswood v. West*, 1 Sim. & Sta. 387.

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Jenny Pigott to live and reside with her, and that she will afford to the said Arabella Anne Caroline Jenny Pigott the same kind attention and tenderness which has been always shown her in my life-time. And I seriously and warmly entreat my said wife, at her decease, to settle and assure, to two trustees, such part of my real estate as she shall think proper, for the special purpose of securing to the said Arabella Anne Caroline Jenny Pigott, during her natural life, (in case she survives my said wife, but not otherwise,) such an income as will enable the said Arabella Anne Caroline Jenny Pigott to enjoy all those comforts of life which she has hitherto been used and accustomed to, leaving the amount of such income to the entire discretion of my said wife. And \*I have devised and bequeathed the whole of my said real and [\*544] personal estate, hereinbefore particularly set forth, unto my said dear wife (and which she must acknowledge not to be inconsiderable) unfettered and unlimited, in full confidence, and with the firmest persuasion that, in her future disposition and distribution thereof, she will distinguish the heirs of my late father, by devising and bequeathing the whole of my said estate, together and entire, to such of my said father's heirs as she may think best deserves her preference. And I constitute and appoint her, my said dear wife, the said Arabella Walker Heneage, sole executrix of this my will."

The testator, by a codicil, charged his real estates with two annuities, which he gave to Arabella Calcraft, one to be paid after his own death, and the other after his wife's, and died in February, 1806. His widow, after his decease, proved his will and entered into possession of his real estates, and possessed herself of his personal estate.

Mrs. Heneage, by her will, dated the 25th of May, 1813, devised all her real estates to trustees, for a term of 500 years, to commence at her decease, and subject thereto to the respondent George Heneage Walker Heneage, (therein called George Heneage Wyld,) the eldest son of the respondent George Wyld by Mary Dionysia, his wife, with remainder to trustees to preserve, &c. with remainders to his first and other sons in tail male, with like remainders to the other sons of Mr. and Mrs. Wyld, and to their sons respectively, with remainders, to the sons of G. H. W. Heneage and of his brothers, in tail general, with remainders to the first and other daughters of G. H. W. Heneage and \*of his brothers, successively in tail male, [\*545] with remainders to the first and other daughters of Mr. and Mrs. Wyld, successively, in tail general, with the ultimate remainder to the respondent Francis John St. Quintin, in fee. The trusts of the term of 500 years were for raising 500*l.* for Miss Pigott, and 700*l.* to be paid to the the testatrix's executors; and an annuity of 1,000*l.* for Miss Pigott; and also for raising some small annuities for the testatrix's servants, and 8,000*l.* to be applied in paying her own and her late husband's debts. And the testatrix bequeathed her household furniture, plate, diamonds, &c. in her mansion house, to go as heir-looms with the mansion house. And she gave, to Jenny Pigott, a gold watch and chain, and to the Rev. J. Cope, a silver inkstand, both of which

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had belonged to her late husband. And the testatrix gave to her nephew, the respondent, E. W. Caulfield, the next presentation to one of her rectories. And she gave the residue of her personal estate to trustees, in trust for Jenny Pigott and Arabella Anne Caroline Jenny Pigott, equally, during their lives and the life of the longest liver, and, after the decease of the survivor, in trust for the said Jonathan Cope, clerk, and all the children of the testatrix's sister Anne Bolleville by her late husband Toby Wade Bolleville, to be equally divided between them; and, in case all such children should die before they attained twenty-one, then in trust for the said Jonathan Cope, his executors, administrators or assigns: and she appointed Lord Andover, Robert Nicholas and George Wyld, executors of her will.

The testatrix made a codicil, dated the 20th of March, 1814, whereby, after reciting the death of Jonathan Cope, she gave to her brother, Sir Jonathan Cope, Bart. the gold pencil case before mentioned; and to [\*546] Arabella \*Calcraft, daughter of the appellant, General John Calcraft, her silver inkstand: and, after the decease of the survivor of the said Jenny Pigott, and Arabella Anne Caroline Jenny Pigott, she gave her residuary personal estate unto the several uses and purposes thereof declared, for the benefit of all the children of her said sister Anne Bolleville by the said Toby Wade Bolleville. The testatrix made three other codicils to her will, the contents of which are not material to be stated, except that, by the third codicil, she appointed the respondent, Edward Goddard, a trustee and executor of her will, in the place of George Wyld.

The testatrix died in June, 1818, leaving the respondents Arabella Diana Duchess of Dorset, and Catharine Countess of Aboyne, heir co-heirs at law.

Lord Andover, Robert Nicholas, and Edward Goddard, proved the testatrix's will and codicils.

In Michaelmas term, 59th Geo. 3, George Heneage Walker Heneage, and his surviving brothers and sisters, filed a bill, in the court of exchequer, against the other respondents and the appellants, stating that the testatrix took, under the will of the testator, an estate in fee simple in the estates devised by his will, and that she had power to devise the same as she had done by her will, and praying that the testatrix's will might be established, and the trusts thereof carried into execution, and for the usual accounts. The appellant, Henrietta Arabella Meredith, in her answer, stated that she and the other appellant, John Calcraft, were the co-heirs at law of the testator, and also of

John Walker, the testator's father; and said that she was advised that, [\*547] under the testator's will, the testatrix \*took a beneficial interest, for her life only, in the estates devised by the testator, and in the residue of his personal estate, with a trust or power only to devise and bequeath the same, at her death, together and entire, to such of the heirs of the testator's father as she thought best; and that the testatrix ought to have exercised such trust or power in favor, either of her the appellant, H. A. Meredith, or of the other appellant, J. Calcraft; and that the testatrix not having

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done so, her will and codicil, so far as regarded the beneficial interest in the testator's real estates, and the residue of his personal estate, were void, except as to the devises and bequests in favor of A. A. C. J. Pigott; and that either she, the said H. A. Meredith, and the other appellant, John Calcraft, were absolutely entitled to the testator's real estate, and to the residue of the testator's personal estate, or else that the appellants as the testator's co-heirs, were absolutely entitled to the said real estates; and that the appellants and the respondents Arabella Bridget, St. Quinton, and Mary Dionysia Wild, as the sole next of kin of the testator, and the respondents, Lord Andover, R. Nicholas, and E. Goddard, as executors of the testator's widow, were entitled to their respective distributive shares of the testator's personal estate. And the appellant H. A. Meredith, accordingly, insisted upon her right to a moiety, of the said real estates, and either to a moiety, or an eighth part of the residue of the personal estate.

The appellant, J. Calcraft, in his answer, submitted that, by the testator's will, a trust was imposed on the testatrix to leave the whole of his real and personal estates to one of the heirs of the testator's late \*father: [\*548] and he submitted that the testatrix had not duly exercised her power over the said estates, inasmuch as she had not selected one of the heirs of the testator's late father: and, as one of the heirs of the testator and his late father, he claimed the benefit which, under the testator's will, had been raised for the heirs of the testator's father, in the event of the power of selection, given to the testatrix, not being duly executed.

The cause was heard on the 12th June, 1820, when the wills and codicils of the testator and testatrix were declared well proved; and inquiries were directed to be made to ascertain who were the heir at law and next of kin, of the testator and his father, at the dates of the testator's will and codicil, and at the time of the testator's death, and also at the dates of the will and codicils of the testatrix, and at the time of her death; and whether the persons to whom the testator's real and personal estate were given by the testatrix's will, were related to the testator's father.

The master reported that, at the date of the testator's will, the testator was heir at law, and the testator and his two sisters, the next of kin of the testator's father; and that, at the date of the testator's codicil, the next of kin of the testator's father, were the testator, the appellants, and three other persons; and that, if the testator had been dead, without issue, at the date of his will, his two sisters, D. Meredith and C. A. Calcraft, would have been the co-heirs at law of the testator's father, and also his next of kin; and that, if the testator had been dead, without issue, at the date of his codicil, the appellants would have \*been heirs at law of the testator's father, and the appellants and three [\*549] other persons, would have been the next of kin of the testator's father; and that, at every other period mentioned in the decree, the appellants were the heirs at law, and two of the next of kin both of the testator and his father.

And the master also found that the appellant John Calcraft was the heir at

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law and personal representative of one of the testator's sisters ; and that the appellant, Henrietta Arabella Meredith was the heir at law and personal representative of the other sister. And the master certified that the devisees of the real estates under the testatrix's will, were the great grandchildren of the testator's father ; but that the other persons named in the testatrix's will and codicils, were not at all related to the testator's father.

The cause having come on for further directions, the question was : whether Arabella Walker Heneage took, under the will of John Walker Heneage, the real and personal property, thereby devised and bequeathed to her, subject to a trust for the heirs of John Walker.

23d May, 1822.—The LORD CHIEF BARON delivered his opinion upon this question, to the following effect : (a)—In this case the bill is filed by the devisees in trust under the will of Arabella Walker Heneage, who was the widow of John Walker Heneage, Esq., against the two co-heirs at law, and some of the next of kin of Mr. Heneage's father, John Walker, the former being also [\*550] \*the co-heirs of Mr. Heneage himself. I conceive this to be a sufficient description of the defendants, for the purpose of the present consideration.

The controversy arises upon the will of Mr. Heneage ; and the question is, whether, under his will, Mrs. Heneage took the absolute interest in his real and personal estates, and had, therefore, a right to dispose of them in favor of the plaintiffs, as she has, by her will, declared her intention to do : or whether she was only a trustee, with an interest in herself merely for her own life, for the benefit of the defendants, or some of them, with a power of selecting some or one of them in preference to the others or other of them. I use the word personal estate, because it is used by Mr. Heneage in his bequest ; and it must, therefore, be necessary, in the construction of his will to observe upon the personal estate, though his personal estate was, as appears by the master's report, insufficient to pay his debts ; and the decision must be confined to his real estate.

This question must be resolved by a due attention to the language of Mr. Heneage's will. What then is the true construction of all the words he has used ? Do they impose a trust on Mrs. Heneage, and are they imperative upon her with respect to the disposition of the property ? or do they import more than the wish of the testator that, if she had no serious disinclination, she should dispose of it to or amongst his father's heirs, leaving it to her own option, however, to deal with it as her own. It must be admitted that it is purely matter of intention, to be collected from the words of the instrument, as in all other cases of wills, where no rule of law interferes.

[\*551] \*It is not necessary to travel through the cases which have been furnished by the great industry, and urged by the great ability of the learned counsel on both sides. Lord Alvanley, when Master of the Rolls, in *Mulim v. Keighley*, (b) has extracted and stated the result of all the cases be-

(a) Mr. Hayter, who was one of the counsel in the cause, kindly furnished the reporter with the note of the judgment, which is inserted in the text.

(b) 2 Ven. J. 333. See also 529.

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fore that time ; and the subsequent cases have, it seems to me, made no alteration. He states the result in the following manner : “ Wherever any person gives property, and points out the object, the property, and the way in which it shall go, that does create a trust, unless he show, clearly, that his desire expressed is to be controlled by the party, and that he shall have an option to defeat it.”

I will not stay to inquire whether the language of that very learned and excellent judge is very accurate, and critically correct as applied to the cases ; but I believe they are the very words his honor used. I think, however, that the result, as stated by him, is sufficiently correct for the present purpose ; and I shall consider the passages in the will accordingly ; and I confess that I feel myself bound by the doctrine delivered in it as generally consistent with the doctrines that have prevailed. But I hope to be forgiven if I entertain a strong doubt whether, in many, or perhaps in most of the cases, the construction was not adverse to the real intention of the testator. It seems to me very singular that a person, who really meant to impose the obligation established by the cases, should use a course so circuitous, and a language so inappropriate and also obscure to express what might have been conveyed in the clearest and most usual terms—terms the most \*familiar to the testator himself, [\*552] and to the professional, or any other person who might prepare his will.

In considering these cases it has always occurred to me that, if I had myself made such a will as has generally been considered imperative, I should never have intended it to be imperative ; but, on the contrary, a mere intimation of my wish that the person to whom I had given my property should, if he pleased, prefer those whom I proposed to him, and who, next to him, were, at the time, the principal objects of my regard. I am happy to reflect that, in this opinion, I have the concurrence of a noble judge, than whom there has never been, nor, I believe, ever can be a person more active in investigating the principles of the law in all its bearings, or more extensively learned on every legal subject. For, in *Wright v. Atkyns*, (c) the Lord Chancellor (d) says : “ This sort of trust is generally a surprise on the intention ; but it is too late to correct that.” Again he says (we know the question was what the word family meant :) “ I do not believe that the testator intended a mere trust ; but that must be the construction, if the word ‘ family ’ is properly construed.” I have said so much as a justification, or rather as the foundation of the opinion which I entertain, that, though I feel myself bound by the decisions and cannot object to follow them, I do not consider it to be my duty to extend the rule of construction which has been adopted in them, and to add to the number of those where the court appears to me rather to have made, than to have given effect to the wills of testators.

\*Now as to Mr. Heneage’s will, it devises all and singular his real [\*553] estates, in the clearest manner, to his dear wife, Arabella Walker

(c) 1 V. &amp; B. 315.

(d) Lord Eldon.



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Heneage, her heirs and assigns, and he bequeaths all his personal estate to her absolutely; and then he proceeds: "And I earnestly recommend, to my said wife, the care and protection of my affectionate friend, Arabella Anne Caroline Jenny Pigott, most heartily beseeching," &c. The words "recommend" and "most heartily beseeching," in the first part of this clause, are very emphatical, as coupled with the rest of the paragraph. But the subsequent words: "I seriously and warmly entreat my said wife, at her decease, to settle and assure, to my two trustees, such part of my real estates." These words are, unquestionably, sufficient to create a trust, and are imperative, unless other words are inconsistent with such a construction. The testator then proceeds: "to assure, to two trustees, such part of my real estate as she shall think proper, for the especial purpose of securing, to the said Miss Pigott during her natural life, in case she survives my said wife, but not otherwise, such an income as will enable Miss Pigott to enjoy all those comforts of life which she has hitherto been used to, leaving the amount of such income to the entire discretion of my said wife."

It has been admitted, by some of the counsel for the defendants, that this clause is not imperative upon Mrs. Heneage, but leaves to her discretion to provide for Miss Pigott, or not, as she might think proper. I take the admission to be perfectly correct; and I conceive it to be very clear that Mrs. Heneage was left to act at her own option. It is true that some of the words [\*554] in this paragraph, would, indisputably, be imperative, \*if the rest of the sentence were constructed in a different manner from what it appears to be. But Mrs. Heneage is desired to settle and assure, at her decease, (and not sooner,) such part as she shall think proper, the amount of such income to be left at Mrs. Heneage's entire discretion. Nothing can show, more satisfactorily than this clause does, the anxious and affectionate desire of the testator to secure a proper provision for Miss Pigott: and it may, perhaps, require some attention to prove that the testator shows clearly (as Lord Alvanley states it) that his desire expressed, is to be controlled by Mrs. Heneage. Yet, without entering into minute circumstances in the clause, let it be recollected that if it import a trust, Miss Pigott must be entitled to a provision independently of Mrs. Heneage, and that Miss Pigott would have a right to call upon the owners of the estate, after Mrs. Heneage's death, to perform that trust, if Mrs. Heneage had died without making the provision so much desired by Mr. Heneage. But I apprehend that Miss Pigott would fail in asserting such a right; for the provision requested was to be at the discretion of Mrs. Heneage. That could not be exercised after her death; and a court of equity could not have assisted her; for a court of equity could not act on the discretion given to Mrs. Heneage, which was purely personal to her. And I believe courts of equity do not interfere in cases of such discretion, when it is entrusted; except in the case of charity, which has always been considered as an excepted case.

Another reason will occur which confirms my opinion upon this part of the will, to which I shall advert soon. I shall only observe, for a moment,

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that the words ; “I seriously and warmly entreat” in the clause respecting Miss Pigott, though amply sufficient to raise a trust in a proper place, are used by this testator where, if my construction is right, they were not meant to imply a trust : and this consideration may be applied to other words of the like import, unless the accompanying words in the clause where they occur, prove the intention to create a trust.

The testator then proceeds in these words : “I have devised and bequeathed the whole of my said real and personal estate hereinbefore particularly set forth unto my said dear wife, and which she must acknowledge not to be inconsiderable :” by which, I conceive, he must refer to the interest which the former part of the will had given to her, viz. the absolute interest in the whole ; and for the quantum of which he seems to demand her gratitude. “I have devised and bequeathed the whole of my said real and personal estate, unfettered and unlimited.” Here, to recur to what I have intimated before, it seems evident that he had not intended to encumber his widow with any imperative trust for Miss Pigott ; for these words “unfettered and unlimited” refer to all the estate he had to dispose of at the instant ; and it seems to me difficult to say that, when he used these words in this place : “I have devised and bequeathed the whole of my said real and personal estate hereinbefore particularly set forth unto my said dear wife, and which she must acknowledge not to be inconsiderable, unfettered and unlimited” that he could have had it in his contemplation to confine the interest, which before had been given to her without limit, to a mere estate for life, with only a power of \*selection amongst [\*556] others, for the remainder. Then he adds the important words which create the difficulty (and a very serious difficulty) in the case : “I devise to her unfettered and unlimited, in full confidence and with the firmest persuasion that, in her future disposition and distribution thereof, she will distinguish the heirs of my late father, by devising and bequeathing the whole of my said estate, together and entire, to such of my said father’s heirs as she may think best deserves her confidence.” Unquestionably, these words are extremely strong ; but when you connect them with the other words, as you must in construing this instrument, I doubt much whether they do more than only import a wish, and not impose a command on the part of the testator.

It has been held (and must I think be admitted) that, if an intention appear, in any part of the will, to give, to the devisee, a right or power to spend the property, words of equal force with those would not be imperative : for the court, in its acuteness to extract the meaning, conceives it to be inconsistent with the intention to create an imperative trust, that the party should have the right or power to dispose of the property at his pleasure, and, by using that privilege to any extent, leave nothing, or more or less, to remain the subject of a trust. In this case the words “unfettered and unlimited,” which are used by the testator to show his opinion of the extent to which he had devised, are, certainly, as strong to manifest an intention to convey the absolute dominion to

the party, as if words had been used more directly authorizing her to spend it, or to deal with it as she pleased.

[\*557] \*Again, the testator seems, in this paragraph, to look back to the bequest to his wife with complacency and with something like a boast, as if he had conferred upon her an obligation, with respect to property, as great as he was capable of doing, and had cast upon her a matter of as great bounty as he could: for he describes it as a bounty "unfettered and unlimited," and appears to observe upon it as entitling him to call for her gratitude, and to request her kindness to his father's heirs: and yet, in the same breath, if the defendant's construction is correct, he limits and fetters this property to a very great extent indeed; and, instead of allowing her to retain the absolute interest which he declares her to possess unlimited and unfettered, he reduces her to the situation of tenant for life only, with a trust or power to appoint the remainder to such of his father's heirs as she should prefer, objects not of her blood, and strangers to her in the eye of the law.

I confess that, in this view of the instrument, there is so much inconsistency, that I have persuaded myself that the testator has not sufficiently exhibited his intention to impose an imperative trust on his wife, but that, on the contrary, he has given her all his property, real and personal, absolutely, and, the more particularly, where the intention is to be extracted from all the words of the will, without any reference to any rule of law: for the heirs, take nothing, as heirs, but they take merely as devisees, as much as if they were strangers.

If I am correct in my opinion upon this subject, it is needless to proceed further. But, as I am not without \*very serious apprehensions (when I am apprized of much better judgments than my own) that I labor under a mistake upon this point, (although I certainly have taken all the pains I have been able to consider all the cases which have been adduced, and all the arguments which have been argued,) it is necessary that I should proceed to the other question, which is: whether, if this be a trust, the objects are sufficiently pointed out. They are described as the heirs of the father. Who are the persons intended by that description? A great deal of argument has been employed upon this subject, on all sides, some insisting that the heirs at law of the testator's father, at the time of making the will or codicil, or at the time of his or his widow's death, were meant; whilst others contend that the next of kin of the testator's father, at some or one of those periods, were with, or exclusively of the heirs at law, the objects intended by the testator. I think it is difficult to suppose that he meant any but those who answered the description given by him of his object at the time of his wife's death; for, as she had the whole period of her life to appoint in, the testator probably contemplated those who should answer, the character marked out, at her death.

In that case, he could have had no individual object or objects in view; for he could not conjecture who might survive his widow. I own it appears to me that, if he had disposed only of his real estate, and it was to be held in trust,

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his heir or heirs at law at the time of his widow's death, would have been the persons intended, the one of them, if there should be more than one, to be preferred to the other or others of them, at the option of the widow. But, by \*this will, all his personal estate is given as the real estate is ; and [\*559] though, as I said before, it appears, by the master's report, that the personal estate was all exhausted in paying the debts, and, therefore, that there was no personal estate to pass by the bequest, yet, in considering the will, we must construe it as if there had been any given amount of personal estate. No doubt, if it appears that the intention was to have an appointment of real and personal estates to the heirs at law, technically speaking, there could be no sound objection to the execution of such intention ; but I doubt as to the declaration of such intention by this will ; and I am not capable of ascertaining, satisfactorily, to whom, under the expression in the will, the widow, if she was a trustee, was to have appointed ; and the court is now placed in that difficulty. For, as the widow (if she be a trustee) has made no appointment according to the trusts, the court is to declare who the objects are ; or, in other words, the court is to declare who took the remainder under Mr. Heneage's will, Mrs. Heneage being, under the disposition, tenant for life, with remainder to other persons. I would ask to whom would they decree both the real and personal estate ? Would they be satisfied that the testator has pointed out the heirs at law of his father, as the objects to take the personal as well as the real estate ; or the heirs and next of kin, or the next of kin only.

I confess that I should feel myself greatly embarrassed in arriving at a decision upon this point : and, if the objects be not certain, there is no trust imposed on Mrs. Heneage. But my opinion, I fairly confess, is formed mainly upon the former point, though I have great doubts as to the latter.

\*I have thus taken the liberty of stating some of the reasons which [\*560] influence my judgment in favor of the plaintiffs, in a case where the intention of the testator, extracted, as it must be, from all the words of his will, must govern, and where I think the intention ought to be clearly and satisfactorily expressed, and, the more especially, as, in my opinion, (which is strengthened by that of a very great judge to whom I have before referred,) the decisions upon this subject have been, in general, a surprise upon a testator, and never, in any case, so much as in this. For this is, *in specie*, a perfectly new case. There is nothing resembling it in any case I have ever yet seen, or that has ever been pointed out. It will be seen that the testator ostentatiously proclaims to his wife that he had given her, and meant to give her the absolute interest ; and yet I am required to attribute to him a covert meaning, from whence it is to be inferred, (and not only inferred,) that, in fact, he gave her only an interest for life, something like a species of fraudulent dealing of which the testator, I think, could not have been guilty.

Graham, B. was of opinion that, by the testator's will, a trust was created, as to the inheritance of the estates, for the persons who might be the heirs at law of the testator's father at the decease of the testator's widow.

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Wood, B. also was of opinion that a trust was created as to the inheritance ; but that learned judge thought that the disposition of estates, made by the widow, was a due execution of the trust.

Garrow, B. agreed with the Lord Chief Baron.

[\*561] \*The decree, on further directions, directed the trusts of the wills of the testator and testatrix to be carried into execution ; and declared that George Heneage Walker Heneage was entitled to an estate for life in such parts of the testator's real estates as were unsold and undisposed of by the testatrix, as were devised to him by the will and codicils of the testatrix, subject to the term of 500 years, with such limitations over as were contained in the will and codicils of the testatrix ; and that the bill should be dismissed as against John Calcraft and Henrietta Arabella Meredith with costs to be taxed, &c.

From this decree the two last named parties appealed to the house of lords.

The case for the appellants concluded as follows :—“The said appellants have appealed to your lordships against so much of the said decree made in the said court of exchequer, in the said cause upon further directions, as declares that the said defendant, G. H. W. Heneage, is entitled to an estate for life in certain parts of the real estate, of the said testator, J. W. Heneage, as were unsold and undisposed of by the said testatrix, Arabella Walker Heneage, in her life-time devised to him by the said will and codicils of the said testatrix, subject to the said term of 500 years, vested in the said respondents, R. Nicholas and Edward Goddard, with such limitations over as are contained in the said will of the said testatrix, and as thereupon orders, adjudges and decrees that the said bill shall stand dismissed out of the court against the said appellants, with costs to be taxed for them ; and by all other the orders and

[\*562] directions contained in the said \*decree of the said court, upon further directions, touching such parts of the real estate of the said testator, J. W. Heneage, as aforesaid, consequent upon the aforesaid declaration of the said court, that the said plaintiff, G. H. W. Heneage, is entitled to an estate for life in the same, subject as aforesaid : inasmuch as the said appellants are advised and insist that the devises and bequests contained in the said will of the said testatrix, Arabella Walker Heneage, of the real and personal estates of the said testator, J. W. Heneage, are void, except so far as regards the provision thereby made for the said Arabella Ann Caroline Jenny Pigott, so long as she remains sole and unmarried ; and that the said appellants, as heirs at law as well of the said John Walker, the father of the said testator, John Walker Heneage, as of the said testator, J. W. Heneage, are entitled to the said real and personal estates of the said testator, J. W. Heneage, subject to the provision so made by the said will of the said testatrix, Arabella Walker Heneage, for the said A. A. C. Jenny Pigott as aforesaid ; for the following amongst other reasons :

1. Because the said testator, J. W. Heneage, by his said will, imposed a trust upon his said wife, the said testatrix, Arabella Walker Heneage, (after

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making a suitable provision out of his real estate for the said A. A. C. J. Pigott, for her life, in manner mentioned in the said will,) to devise and bequeath the whole of his real and personal estate, together and entire, to one of the heirs of his late father, John Walker, giving her power only to select such one of the heirs of his the said testator's said father as she might think best deserved her preference: and because the property which was the \*sub- [\*563] ject of the trust was certain, viz. the real and personal estate of the testator together and entire, subject to such income out of the testator's real estate as his said wife should secure to the said A. A. C. J. Pigott, for her life, in the manner mentioned in his said will. And because the persons in whose favor the trust was imposed, were certain, viz. the heirs of the said testator's father, John Walker, to one of whom the said testator's wife (after making a suitable provision out of the testator's real estate for the said A. A. C. J. Pigott, for her life, as aforesaid) was to devise and bequeath the said testator's real and personal estate together and entire. It is to be observed that, at the time the said testator made his said will, he had two sisters living, who, in case of his death, would be the heirs of his said father, and both of whom having issue living at the time, the probability was that the said testator's wife would have a power of selection amongst the heirs of the said testator's father and which in fact happened, there having been two heirs of the testator's father living, as well at the respective times of the testator's making his will, (setting himself out of the question) and of his death, as at the respective times of the said testatrix making her said will and codicils, and of her death."

2. "Because the word 'heirs' in the clause in question in the said testator's will, must be construed in its plain and usual acceptation, as meaning the very heirs of the said testator's said father at the time of the said testatrix making her selection and death, that being the meaning of the word 'heirs' whenever it is used as a designation of the person or persons to take, and there being nothing in this case to call for a departure \*from such meaning [\*564] of the word. And because the meaning which the said respondents, the plaintiffs in the said cause, put upon it, viz. all the heirs of the said testator's father present and to come, proximate and remote, so as to admit of the said testatrix selecting any descendants of the said testator's father, though not one of the very heirs, to whom to give his real and personal estate, is strained, unnatural, and unwarranted by any decided case."

3. "Because, supposing the power, given by the said testator to the said testatrix, to have enabled her to devise and bequeath his real and personal estate to any descendant of the said testator's said father, though not one of the very heirs, yet she has not well executed the power, inasmuch as she has not, after making provision for the said A. A. C. J. Pigott, for her life, as mentioned in the case, given the said testator's real and personal estate, together and entire, to one of such descendants whom she might think best deserved her preference, but has given certain articles of the said testator's personal estate, which remained in her hands, *in specie*, to persons entirely strangers in blood to the

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said testator's said father ; and after making provision for the said A. A. C. J. Pigott, for her life, as mentioned in the case, has devised the said testator's general real estate to divers of the descendants of the said testator's said father, for limited estates and interests, in succession, in strict settlement, and has made certain provisions, out of such real estate, for persons entirely strangers in blood to the said testator's said father, and for purposes not authorized by the said testator's will, besides having sold and disposed of certain parts of such real estate in her lifetime."

[\*565] "The appeal having been heard, The Lord Chancellor(e) said that it would be difficult to say that the devise to the testator's widow created a condition, as there was a degree of uncertainty who was to take advantage of a breach of the condition ; that the only question was whether it created a trust : that, if a confidence was reposed in the devisee, but it appeared that the testator did not mean absolutely to control the will of his devisee, though the subject and object of the intended provision were both certain, no trust would be created : that it was impossible for a testator to express recommendation and entreaty more strongly than he had done with regard to Miss Piggott, and that the words used, for that purpose, were quite sufficient to create a trust, if the other expressions in the same part of the will had been sufficient for that purpose : that there was a certainty as to the person, but not as to the quantity of property to be given to her, which was left in the wife's discretion : that the testator, though he intended to impose a moral obligation on his wife, could not mean to impose a legal one upon her, or else he would not have used the terms "unlimited and unfettered," or have designated the property he had left her as very considerable, because, if he intended her to have a life interest only in it, her enjoyment might have been very momentary : that there was very considerable difficulty in saying who were the persons who were described as the heirs of the testator's father, and in reconciling, the direction that the property should go altogether and entire, with the wish expressed, by the testator, that his wife should not only [\*566] make a disposition, but a \*distribution of it : that the cases of *Brown v. Higgs*,(f) and *Harding v. Glyn*,(g) which had been relied on for the appellants, did not govern this case : and that this was not a case in which the testator meant to impose that obligation which would convert the testatrix into a trustee : and that, therefore, the decision of the court of exchequer was right.

Lord Redesale said that all cases of this description, were to be considered with very considerable strictness, as it was a very inconvenient mode of disposition : that the appellants could not claim under the will, but must claim against it, either because a condition had been broken, or a trust not duly executed : that, in all the cases that had been referred to, there were persons who were defined to be objects of the trust ; and, if the trust was not

(e) Lord Eldon.

(f) 8 Ves. 561.

(g) 1 Atk. 469.

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executed by the trustee, the court took upon itself to execute it according to what it conceived to be the intent of the testator: that that could not be done here, as the estate could not be conveyed, to the two appellants entire: that a condition was not created, as the testator declared that he had given his property, to his wife, "unfettered and unlimited;" and that his lordship perfectly agreed with the decision of the court of exchequer.<sup>(h)</sup>

Ordered and adjudged that the appeal be dismissed, and the decree complained of affirmed.

\*The appellants' case was signed by Mr. *Heald*, Mr. *Shadwell*, Mr. [\*567] *Sugden* and Mr. *Boteler*; and the three cases for the respondents, by Sir *Charles Wetherell*, S. G., Mr. *Roupell* and Mr. *Preston*, Mr. *Horne*, and Mr. *Lynch*, and Mr. *Wray* and Mr. *Coote*.<sup>[1]</sup>

(h) The above report of the opinions delivered by Lords Eldon and Redesdale, was extracted from the notes of a short-hand writer, with which Mr. *Preston* kindly furnished the reporter.

[1] See preceding case, and note, *ibid*. *Lawless v. Shaw*, Lloyd & Goold, 163. *Podmore v. Gunning*, 5 Sim 485. *Benson v. Whittam*, *id*. 22.





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1. An annuity given to A. for his personal support, not to be liable to his debts, and to be paid from time to time into his proper hands, and not to any other person, and his receipt only to be a sufficient discharge, passes on A.'s bankruptcy, to his assignees. *Graves v. Dolphin*, 66
2. A., the widow and administratrix of B., continues B.'s trade after his decease. B., at his death, was indebted to C., on balance of account. A. continues to receive goods from, and to make payments to C. as B. had done, and she is charged, in account, by C. with the debt. The payments made by her to C. exceed the debt, but a balance is ultimately due to C. Held that A.'s debt was discharged by B.'s payments, and that the ultimate balance cannot be proved against B.'s estate. *Sterndale v. Hankinson*, 393  
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no partnership should exist between them. A., for himself and the other parties, agrees, with the mint, to carry coin from L. to F., and afterwards makes another agreement with the mint, to carry other coin to places not on the road: Held that all the parties were entitled to share in the profits of this agreement. *Russell v. Austwick*, 52

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See LACHES. PLZA.

CONSIDERATION.

A grant of an annuity to the grantor's sister, though expressed to be made for natural love and affection, may be proved to have been made in consideration of her marriage, and will entitle her to rank as a specialty creditor of the grantor. *Tanner v. Byne*, 160

CONSTRUCTION.

1. Tenant for life unimpeachable of waste except in the park, demesne lands, and woods adjoining the capital messuage, there being no woods of that description, cannot cut timber in any of the woods that are either an ornament or shelter to the messuage. *Newdigate v. Newdigate*, 131
2. A policy of insurance, for 3,000*l.*, on A.'s life, was, assigned to trustees, and by a deed of even date, trusts were declared of it, by the

description of: "the sum of 3,000*l.*, for which A.'s life was insured," and power was given to B. to dispose of it by will. B., after reciting the settlement bequeathed 1000*l.*, part of the sum of 3,000*l.*, to A., and the remaining sum of 2,000*l.* to C. At A.'s death 9,000*l.* were received under the policy: Held that the whole fruits of the policy were subject to the trusts of the settlement, and passed, by the bequests, to A. and C., in proportion to their legacies. *Counctney v. Ferrars*, 137

3. The word "hereinafter" construed "herein." *Bengough v. Edridge*, 173

4. A feme covert having power to dispose, by will, of personal property, and of a real estate at N., by her will, after reciting the power, gave several pecuniary legacies, and then gave to her husband, her fields and house at N., likewise the remainder of her personalty, and all she might die possessed of after payment of her debts, legacies, and funeral and testamentary expenses: held that the husband took a life estate only in the realty, notwithstanding the gift to him of all the testatrix might die possessed of. *Monk v. Mawdsley*, 286

5. A testator gave all his real and personal estate to trustees in trust as to one moiety, for A. for life, with remainder to her children, and, as to the other moiety, for B. and her children, in like manner. By a codicil, he declared that his estates should not be divided equally between A. and B., but in proportion to the number of their children; and he left A. and B. jointly, his residuary legatees. By another codicil, in order to prevent disputes, he gave one of his estates to A. and her heirs, and the other to B. and her heirs, the number of their children nearly equalizing the value of the two estates. In a subsequent codicil he mentioned that he had bequeathed the first estate to A. and her children, and the second to B. and her children: held that A. and B. were entitled to these estates for their lives only, with remainders to their children, and that they were not entitled to the personal estate absolutely, but for their lives only, with remainders to their children, and in shares proportioned to the number of their children. *Lushington v. Sewell*, 435

6. A testator directed that one of his residuary legatees should be answerable for all debts due to him from the father of the legatee. A debt, though usurious, must be deducted from the legatee's share. *Stanton v. Knight*, 482

7. Trust, created by will, to purchase land, to be added and closely entailed to a testator's family estate in possession of T. B.; testator declaring that his object was to have a head to the family; and that, if T. B. should die without male issue, or dispose of the family estate, the residue of his fortune should go to A. B. or his nearest relative in the male line; how to be executed. *Woolmore v. Burrows*, 512

8. Testator having given an annuity to one of his next of kin, and expressed a reason for giving nothing to the others, gave the residue of his property to his wife, recommending to her and not doubting that she would consider his near relations, as he would have done if he had survived her. Held, that there is no trust for

the next of kin, but that the wife takes the residue absolutely. *Sale v. Moore*, 534

9. Testator, after giving his real and personal estates to his wife in fee, said that he had given the same to her unfettered and unlimited, in full confidence that in her future disposition thereof, she would distinguish the heirs of his late father, by devising the whole of his estate together and entire to such of his father's heirs as she might think best deserved her preference. Held that no trust was created. *Meredith v Heneage*, 542

See CUSTOM OF LONDON. POWER. WEST INDIA ESTATE.

### CONSTRUCTION OF ORDER.

- A party ordered to produce books, &c. before the master is bound to leave them if the master thinks fit so to direct. *Sidden v. Liddiard*, 388

### CONTEMPT.

Although a reference to arbitration is made under an order of the court, either party may revoke the authority of the arbitrator before the award is made; but it is a high contempt so to do. *Haggett v. Welsh*, 134

### CONVERSION.

Testatrix gave her real and personal estate to trustees to sell, and directed that the proceeds of her real estate should be taken as part of her personal estate, that out of the moneys to arise by such sale, and out of all other her personal estate, her legacies should be paid, and gave the residue to A. for life, with remainder over: held that the real estate was absolutely converted into personalty, and that some of the legacies, which had lapsed, belonged to the residuary legatee, and not to the heir. The legacies not having been paid within a year after testatrix's death, A. is not entitled to that year's income, but it forms part of the capital of the residue. *Amphlett v. Parke*, 275

### COSTS.

A plaintiff resident abroad, who had been ordered to give security for costs, but had not complied, ordered to give the security, and on default his bill to be dismissed. *Camac v. Grant*, 348

### CUSTOM OF LONDON.

The personal estate of an honorary freeman of the city of London, is in case of his dying intestate, distributable according to the custom of London; and his widow is not barred of her customary share by a settlement which is expressed to be in lieu of all dower, or thirds, or other portion at common law, or otherwise, out of his freehold and copyhold lands. *Onslow v. Onslow*, 18

### DEBTOR OR CREDITOR.

1. The wife of a bankrupt, having separate property died in France, in possession of other property there, which was claimed by the creditors, as belonging to the husband. She, by will, disposed of all her separate estate, except

1500l. consols (which, in default of appointment, was held in trust for her executors or administrators,) and appointed a lady, resident in France, her executrix. Injunction granted, at the suit of the assignees, to restrain the transfer of the consols; but refused as to the rest of the separate estate. *Stead v. Clay*, 294

2. A. the widow and administratrix of B. continues B.'s trade after his decease. B., at his death, was indebted to C. on balance of account; A. continues to receive goods from and to make payments to C. as B. had done, and she is charged, in account, by C. with the debt. The payments made by her to C. exceed the debt; but a balance is ultimately due to C. Held that A.'s debt was discharged by B.'s payments, and that the ultimate balance cannot be proved against B.'s estate. *Sternedale v. Hankinson*, 393

### DEFENDANT.

A broker in the city of London must answer a bill of discovery in aid of an action, brought against him by his employer, for misconduct, although the discovery will subject him to the penalties of a bond given by him to the corporation on his admission. *Green v. Weaver*, 404  
See PRACTICE, 11.

### DELAY.

See LACHES.

### DEMURRER.

1. A speaking demurrer is where a new fact is introduced which is necessary to support the demurrer. *Davies v. Williams*, 5  
2. The eight days within which a demurrer must be entered with the register, are eight office-days. *Bullock v. Edington*, 481  
3. A bill in equity does not lie by the assignees of a bankrupt against a judgment-creditor and the sheriff, for moneys levied under an execution upon a judgment by *nil dicit*. *Mitchell v. Knott*, 497  
See EQUITY. JURISDICTION. PLEADING, 1.

### DEPOSITIONS.

1. Office copies of depositions by living persons, in a tithe suit in the exchequer, may be read, in a similar suit in this court, against another defendant who makes the same defence, on production of office copies of the bill and answer in the former suit, without any order of this court for that purpose. *Williams v. Broadhead*, 151  
2. Depositions taken, after decree, by commission, or by the examiner, are published by order of court; and those taken before the master, by his warrant. *Handley v. Billinge*, 511  
3. If a bill is amended by adding parties after witnesses have been examined, their depositions can not be read against the new parties. *Pratt v. Barker*. *Pretty v. Barker*, 1

### DEVISE.

1. A testator makes a general devise of all his lands in nine parishes: in five of them he had only lands in fee; in three others, he had only

lands over which he had a power of appointment; in the other, he had lands in fee, and also lands over which his power extended. All the lands pass by his will except the lands in the latter parish, which were subject to his power.

*Napier v. Napier*, 28

2. Trusts to be performed after the expiration of a term in gross of twenty years from the decease of the survivor of twenty-eight persons, who were living at the testator's decease, are valid. *Bengough v. Edridge*, 173  
See WEST INDIA ESTATE.

#### DISCOVERY.

See ANSWER, 2. PLEA.

#### DISMISSAL.

Where there are two plaintiffs and one of them only becomes bankrupt, the bill may be dismissed upon the usual motion. *Caddick v. Mason*, 501

#### DIVIDENDS, (SALE OF.)

An assignment of 150*l.*, part of the dividends of a sum of stock to which the vendor was entitled for life, with a proviso that the purchaser should not receive any part of the dividends then growing due, but a proportionable part of the 150*l.* is a grant of an annuity to that amount, and must be memorialized. *Charretie v. Vause*, 153

#### DOCUMENTS.

See CONSTRUCTION OF ORDER.

#### DOWER.

See WIDOW.

#### ELECTION.

To raise a case of election there must be a form of gift as to the property which the donor had no power to dispose of. *The Attorney General v. The Earl of Lonsdale*, 105

#### EQUITY.

1. A tenant has no equity to compel his landlord to expend money, received from an insurance office, on the demised premises being burnt down, in rebuilding the premises, or to restrain the landlord from suing for the rent until the premises are rebuilt. *Leeds v. Cheetham*, 146
2. A bill in equity does not lie, by the assignees of a bankrupt, against a judgment creditor and the sheriff, for moneys levied under an execution upon a judgment by nil dicit. *Mitchell v. Knott*, 497
3. A bill in equity lies to recover deposits paid by a shareholder in a joint-stock company where the project is a bubble. *Green v. Barrett*, 45  
See PARENT AND CHILD.

#### EVIDENCE.

1. If a bill is amended by adding parties, after witnesses have been examined, their depositions cannot be read against the new parties. *Pratt v. Barker. Pretty v. Barker*, 1
2. Office copies of depositions by living persons

in a title suit in the exchequer, may be read in a similar suit in this court, against another defendant who makes the same defence, on production of the office-copies of the bill and answer in the former suit, without any order of this court for that purpose. *Williams v. Broadhead*, 151

3. A tenant for life of an estate settled in strict settlement, buys up some of the charges on the estate, and has them assigned to a trustee: he next purchases the ultimate remainder, and has it conveyed to him, subject to the subsisting charges; he then devises the estate, subject to the charges that might be thereon at his decease: the immediate remainders fail at his death. The charges so purchased are merged; and parol evidence is admissible to prove that the testator so intended. *Astley v. Miles*, 298

See SPECIALTY CREDITOR, 2.

#### EXCEPTIONS.

1. An exception may be regularly filed to the master's report as to impertinence, after the order to expunge, and at any time before the impertinent matter is actually expunged. *David v. Williams*, 17
2. Exceptions will not lie to the return of commissioners in a suit for partition, on the ground of inequality of value in the lots. In all cases of improper conduct in the commissioners a motion must be made to suppress the return. *Jones v. Totty*, 136
3. A master's certificate as to production of books, &c. cannot be excepted to; a motion must be made to quash it. *Jones v. Powell*, 387
4. Exceptions to an answer filed after the bill has been amended, will not be taken off the file if no answer is required to the amendments. *Miller v. Wheatley*, 296
5. If a general exception is taken to a master's report, and the court is of opinion that the master is right in any one particular, the exception must be overruled. *Green v. Weaver*, 404

#### EXECUTOR.

An executor in India is entitled to a commission of 5 per cent. on all assets of a testator collected by him there, including the assets which he retains in respect of a legacy to himself, not given to him in the character of executor, and including moneys belonging to the testator which were in the hands of a commercial house in which the executor was, and the testator had been a partner. *Cockerell v. Barber*, 53

See PARTIES, 1. PRACTICE, 22 and 25. WILL, 1.

#### FEME COVERT.

The husband of a woman entitled to a fund in a cause, signed, after the marriage, a written agreement that he would settle half the wife's fortune upon her: held that the agreement enured to the benefit of the children of the marriage, and that therefore the wife could not waive it. *Fenner v. Taylor*, 169  
See LIGATION, 2. POWER, 2.

## FINE.

A fine and non-claim cannot be pleaded in bar to a bill to prevent the setting up of an outstanding term. *Leigh v. Leigh*, 349

FOREIGN ATTACHMENT,  
See ATTACHMENT (FOREIGN.)

## FOREIGN STATES.

A foreign state may sue in this court. But where a bill was filed by: "the government of the state of Columbia and Don M. J. Hurtado, a citizen of that state, and minister plenipotentiary from the same to the court of his Britannic Majesty, and now residing at 33 Baker-street, Portman-square, in the county of Middlesex," a general demurrer was allowed to the bill, because the description of the plaintiffs did not enable the defendants to know upon whom process was to be served in case a cross-bill were filed. *The Columbian Government v. Rothschild*, 94

## FRAUD.

1. The court refused to set aside a voluntary deed, executed by an old and infirm man, in favor of a person who attended him as a surgeon, and received the dividends of some stock for him. It appearing that the nature and effect of the deed were fully explained, to the grantor, by his solicitor, before he executed it, and that no undue influence had been exercised over him. *Pratt v. Barker. Pretty v. Barker*, 1
2. The shareholders in a joint-stock company are entitled to relief in equity, where the conduct of the directors has been fraudulent, or a violation of the terms on which the conduct was formed. *Blain v. Agar*, 37
3. A bill in equity lies to recover deposits, paid by a shareholder in a joint-stock company, where the project is a bubble. *Green v. Barrett*, 45
4. A partner who superintended, exclusively, the accounts of the concern, agreed to purchase his co-partner's share of the business for a sum, which he knew, from accounts in his possession, but which he concealed from his co-partner, was an inadequate consideration. The agreement was set aside. *Maddeford v. Austwick. Austwick v. Maddeford*, 89

## FREEMAN OF LONDON.

See WIDOW.

## HABEAS CORPUS.

See PRACTICE, 15.

## HEIR AND EXECUTOR.

If an estate descends subject to a mortgage, and the heir creates a new mortgage for securing the old debt and also one contracted by himself and fixes a new day of payment, he makes himself liable to both debts, notwithstanding he exempts, in the new security, his person and property, except what is comprised in the new mortgage, from liability in respect of the debts. *Lushington v. Sewell*, 435  
See CONVERSION. PRACTICE, 22. WILL, 1.

## IMPERTINENCE.

See PRACTICE, 4.

## INFANT.

A suit being instituted, on behalf of infants, by a solicitor wholly unconnected with the family, it was, on the motion of the defendant, referred to the master to inquire whether it would be for the infants' benefit that the suit should be prosecuted, the defendant undertaking to render to the master the accounts prayed for by the bill. *Richardson v. Miller*, 133  
See PRACTICE, 17.

## INFLUENCE (UNDUE.)

See FRAUD, 1.

## INJUNCTION.

1. The plaintiff in a bill of interpleader may move, at once, for a special injunction, on payment of the money into court, without first obtaining the common injunction. *Vicary v. Widger*, 15
2. The wife of a bankrupt, having separate property, died in France in possession of other property there, which was claimed by the creditors, as belonging to the husband. She, by will, disposed of all her separate estate, except 1,500*l.* consols, (which, in default of appointment, was held in trust for her executors or administrators,) and appointed a lady resident in France, her executrix. Injunction granted, at the suit of the assignees, to restrain the transfer of the consols, but refused as to the rest of the separate estate. *Stead v. Clay*, 294
3. Injunction granted to restrain the disclosure of secrets come to the defendant's knowledge in the course of a confidential employment. *Evitt v. Price*, 483
4. Motion to extend common injunction granted, where the answer, which was filed on the same morning, was insufficient, and the trial was coming on the next day but one. *Munnings v. Adamson*, 510

See EQUITY, 1. INTERPLEADER.

## INTEREST.

The amount of deterioration of an estate pending a suit for specific performance having been ascertained, by an issue, the purchaser was allowed it out of his purchase money which he had paid into court under an order with interest from the time when he paid in his money. *Ferguson v. Tadman. Ruck v. Tadman*, 530  
See CONVERSION.

## INTERPLEADER.

No affidavit is necessary to support a motion by a plaintiff in an interpleading suit for liberty to pay the money into court, and for an injunction. *Walbanke v. Sparks*, 385  
See INJUNCTION, 1.

## JOINT STOCK COMPANY.

1. The shareholders in a joint-stock company are entitled to relief in equity where the conduct of the directors has been fraudulent, or a viola-

- tion of the terms on which the company was formed. *Blain v. Agar*, 37
2. A bill in equity lies to recover deposits paid by a shareholder in a joint-stock company, where the project is a bubble. *Green v. Burrett*, 45

### JUDGMENT DEBT.

A judgment in the lord mayor's court, obtained against the garnishee does not entitle the plaintiff to rank as a judgment creditor in the administration of the garnishee's assets. *Holt v. Murray*, 485

*See EQUITY*, 2.

### JURISDICTION.

A foreign state may sue in this court. But where a bill was filed by "The Government of the State of Columbia and Don M. J. Hurtado, a citizen of that state, and minister plenipotentiary from the same to the court of his Britannic Majesty, and now residing at 33 Baker-street, Portman Square, in the county of Middlesex," a general demurrer was allowed to the bill, because the description of the plaintiffs did not enable the defendants to know upon whom process was to be served in case a cross bill were filed. *The Columbian Government v. Rothschild*, 94

### LACHES.

The original bill being for an account and an injunction to restrain an action, and the injunction having been dissolved on the merits, nearly ten years after the bill was filed, the plaintiff filed a supplemental bill, for a discovery and commission to examine witnesses in aid of his defence to an action substantially the same: Motion for the commission refused, with costs, on the ground of delay. *Todd v. Aylwin*, 271

### LANDLORD AND TENANT.

A tenant has no equity to compel his landlord to expend money received from an insurance office on the demised premises being burnt down, in rebuilding the premises, or to restrain the landlord from suing for the rent until the premises are rebuilt. *Leeds v. Cheetham*, 146

### LEGACY.

*See WILL*, 3.

### LIMITATIONS.

*See STATUTE OF LIMITATIONS*.

### MASTER'S CERTIFICATE.

The master's certificate, as to production of books, &c. by a party, cannot be excepted to; a motion must be made to quash it. *Jones v. Powell*, 387

### MERGER OF CHARGES.

A tenant for life of an estate settled in strict settlement, buys up some of the charges on the estate, and has them assigned to a trustee: he next purchases the ultimate remainder, and has it conveyed to him subject to the subsisting

charges: he then devises the estate, subject to the charges that might be thereon at his decease: the intermediate remainders fail at his death. The charges so purchased are merged: and parol evidence is admissible to prove that the testator so intended. *Astley v. Miles and others*, 298

### MISREPRESENTATION.

1. A piece of land imperfectly watered was described, in the particular, as uncommonly rich water-meadow: held that this was not such a misrepresentation as would avoid the sale. *Scott v. Hanson*, 13
  2. If A. in contracting with B. falsely represents himself to be the agent of C., and thereby obtains better terms, the court will, notwithstanding, enforce the contract, unless A. knew that such would be the effect of the misrepresentation. *Fellowes v. Lord Gwydyr*, 63
- See AGREEMENT*, 2.

### MORTGAGE.

*See HEIR AND EXECUTOR*.

### NEXT FRIEND.

A suit being instituted on behalf of infants, by a solicitor wholly unconnected with the family, it was on the motion of the defendant referred to the master to inquire whether it would be for the infants' benefit that the suit should be prosecuted, the defendant undertaking to render to the master the accounts prayed for by the bill. *Richardson v. Miller*, 133

*See PRACTICE*, 17.

### ORDER.

*See ATTACHMENT. CONSTRUCTION*.

### OUTSTANDING TERMS.

*See FINE. PLEADING*, 3, 4.

### PARENT AND CHILD.

The husband of a woman entitled to a fund in a cause, signed, after the marriage, a written agreement that he would settle half the wife's fortune upon her: held that the agreement enured to the benefit of the children of the marriage, and that therefore the wife could not waive it. *Fenner v. Taylor*, 169

### PARTIES.

1. Where one executor has alone proved, he may sue without making the other executors parties, although they have not renounced. *Davies v. Williams*, 5
2. A few of a large number of persons may institute a suit on behalf of themselves and the rest, for relief against acts injurious to their common right, although the majority approve of those acts, and disapprove of the institution of the suit; and the attorney general need not be a party to it; but, where the whole body concur in an abuse, the suit must be instituted by the attorney general. *Bromley v. Smith*, 8
3. If several shareholders assign, by deed, their



deposits to others, and appoint the latter their attorneys for recovering their deposits, the assignees cannot sue on behalf of themselves and their assignors; but the latter however numerous, must be parties to the suit. *Blain v. Agar*, 37

See PLAINTIFF.

### PARTITION.

Exceptions will not lie to the return of commissioners in a suit for partition on the ground of inequality of value in the lots. In all cases of improper conduct of the commissioners, a motion must be made to suppress the return. *Jones v. Totty*, 136

### PARTNERSHIP.

1. A. B. &c. were common carriers from L. to F., a separate portion of the road being allotted to each, and it having been stipulated also that no partnership should exist between them. A. for himself and the other parties, agrees, with the mint to carry coin from L. to F., and afterwards makes another agreement, with the mint to carry other coin to places not on the road: held that all the parties were entitled to share in the profits of this agreement. *Russell v. Austwick*, 52
2. One of two solicitors, who were partners, became bankrupt; the assignees excluded the other from interfering with the affairs of the partnership: the court, nevertheless, refused to order the assignees to deliver to him the papers belonging to the clients of the firm. *Davidson v. Napier*, 297
3. If a partner borrows a sum of money and gives his own security only for it, it does not become a partnership debt by being applied for partnership purposes with the knowledge of the other partner. *Bevan v. Lewis. Stokes v. Whittaker*, 376

See AGREEMENT, 1.

### PENALTIES.

See ANSWER, 2.

### PERPETUITY.

Trusts to be performed after the expiration of a term in gross of twenty years from the decease of the survivor of twenty-eight persons who were living at the testator's decease are valid. *Bengough v. Edridge*, 173

### PERSONAL ESTATE.

See ASSETS, 1. HEIR AND EXECUTOR. WILL, 1, 3.

### PLAINTIFF.

A foreign state may sue in this court: but where a bill was filed by "The government of the State of Columbia, and Don M. J. Hurtado, a citizen of that state and minister plenipotentiary from the same to the court of His Britannic Majesty, and now residing at 33, Baker-street, Portman-square, in the county of Middlesex;" a general demurrer was allowed to the bill because the description of the plaintiffs did not enable the defendants to know upon whom

process was to be served in case a cross bill were filed. *The Columbian Government v. Rothschild*, 94  
See COSTS.

### PLEA.

1. A plea that the plaintiff has no interest in the subject of the suit, is a good plea to a bill for discovery and commission. *Mendizabel v. Machado*, 68
2. Treaties and conventions between foreign states may be pleaded to a bill for discovery and commission, where it appears from them that the plaintiff is not entitled to make the demand which he is seeking to substantiate. ib

### PLEADING.

1. Where a plaintiff, by the present practice of the court, may obtain that relief by petition, for which a supplemental bill was formerly necessary, and prefers the latter course, the supplemental bill is not demurrable, but the proceeding will be taken into consideration on the question of costs. *Davies v. Williams*, 5
2. A few of a large number of persons may institute a suit on behalf of themselves and the rest, for relief against acts injurious to their common right, although the majority approve of those acts, and disapprove of the institution of the suit, and the attorney general need not be a party to it; but where the whole body concur in an abuse, the suit must be instituted by the attorney general. *Bromley v. Smith*, 8
3. A fine and non-claim cannot be pleaded in bar to a bill to prevent the setting up of an outstanding term. *Leigh v. Leigh*, 349
4. The statute of limitations may be pleaded in bar to a bill to prevent the setting up of outstanding terms. *Jermy v. Best*, 373
5. A broker in the city of London must answer a bill of discovery in aid of an action brought against him by his employer for misconduct, although the discovery will subject him to the penalty of a bond given by him to the corporation on his admission. *Green v. Weaver*, 404

### POLICY OF ASSURANCE.

A policy of assurance for 3,000*l.* on A.'s life was assigned to trustees, and, by a deed of even date, trusts were declared of it by the description of "the 3,000*l.* for which A.'s life was insured," and power was given to B. to dispose of it by will. B., after reciting the settlement, bequeathed 1,000*l.* part of the sum of 3,000*l.*, to A., and the remaining sum of 2,000*l.* to C. At A.'s death 9,000*l.* was received under the policy: held that the whole fruits of the policy were subject to the trusts of the settlement, and passed by the bequests, to A. and C. in proportion to their legacies. *Courtney v. Ferrars*, 137

### POWER.

1. A testator makes a general devise of all his lands in nine parishes: in five of them he had only lands in fee; in three others he had only lands over which he had a power of appoint-

- ment; in the other he had lands in fee, and also lands over which his power extended: all the lands pass by his will except the lands in the latter parish which were subject to his power. *Napier v. Napier*, 28
2. A feme covert having power to dispose, by will of personal property, and of a real estate at N., by her will, after reciting the power, gave several pecuniary legacies, and then gave to her husband her fields and house at N., likewise the remainder of her personalty, and all she might die possessed of, after payment of her debts, legacies, and funeral and testamentary expenses: held that the husband took a life-estate only in the realty, notwithstanding the gift to him of all the testatrix might die possessed of. *Monk v. Mawdsley*, 286

PRACTICE.

1. If a bill is amended by adding parties after witnesses have been examined, their depositions cannot be read against the new parties. *Pratt v. Barker. Pre ty v. Barker*, 1
2. Exceptions to an answer having been allowed, plaintiff obtained an order to amend, and for defendant to answer the exceptions and amendments at the same time: defendant put in an answer to the amended bill only. The plaintiff then issued an attachment: held that it was irregular, and that plaintiff ought to have moved to take the second answer off the file. *DeTastet v. Lopez*, 11
3. The plaintiff in a bill of interpleader, may move, at once, for a special injunction, on payment of the money into court, without first obtaining the common injunction. *Vicary v. Widger*, 15
4. An exception may be regularly filed to the master's report as to impertinence after the order to expunge, and at any time before the impertinent matter is actually expunged. *David v. Williams*, 17
5. Exceptions will not lie to the return of commissioners in a suit for partition, on the ground of inequality of value in the lots. In all cases of improper conduct in the commissioners a motion must be made to suppress the return. *Jones v. Totty*, 136
6. Office-copies of depositions, by living persons, in a title suit in the exchequer, may be read in a similar suit in this court, against another defendant who makes the same defence, on production of office copies of the bill and answer in the former suit, without any order of this court for that purpose. *Williams v. Broadhead*, 151
7. The vendor may confirm an order nisi obtained by the purchaser if the latter neglect to do so. *Chillingworth v. Chillingworth*, 291
8. Exceptions to an answer filed after the bill has been amended, will not be taken off the file if no answer is required to the amendments. *Miller v. Wheatley*, 206
9. A plaintiff resident abroad, who had been ordered to give the security for costs, but had not complied, ordered to give the security, and on default his bill to be dismissed. *Camac v. Grant*, 348
10. A witness who had answered some of the interrogatories, but refused to answer the others, was ordered to answer those interrogatories

- within four days, or to stand committed. *Austin v. Prince*, Ibid
11. A defendant in a suit by the assignees of a bankrupt cannot object to the bill as not having been filed with the consent of the creditors, unless the objection is made by the answer. *Bevan v. Lewis. Stokes v. Whittaker*, 376
12. No affidavit is necessary to support a motion, by a plaintiff in an interpleading suit, for liberty to pay the money into court, and for an injunction. *Walbanke v. Sparks*, 385
13. An order for time to answer unless drawn up and served, will not stop an attachment. *Gayler v. Fitzjohn*, 386
14. The master's certificate, as to production of books, &c. by a party cannot be excepted to, a motion must be made to quash it. *Jones v. Powell*, 387
15. Where a messenger has been sent upon a return of *cepi corpus*, and the defendant is in K. B. prison upon *meane process*, a *habeus corpus* must next be obtained. *Neame v. Wagstaff*, 389
16. Attachment granted for non-appearance to a subpoena served abroad. *Nichol v. Gwynn*, Ibid
17. The court will remove a next friend, and appoint a new one where the former is so connected with a defendant having an interest adverse to that of the infants, as to make it probable that their interest will not be properly protected by him. *Peyton v. Bond. Peyton v. Robinson*, 390
18. The eight days within which a demurrer must be entered with the register, are eight office-days. *Bullock v. Edington*, 481
19. Bill restored, though the order to dismiss was not obtained till after a considerable interval since the last proceeding in the cause, and through the plaintiff had acquiesced in the order; the suit being one in which the main object was obtained. *Barfield v. Nicholson*, 500
20. A bill may be amended by adding plaintiffs, notwithstanding the defendants have answered it. *Hichens v. Congreve*, 500
21. Where there are two plaintiffs and one of them only becomes bankrupt, the bill may be dismissed upon the usual motion. *Cuddick v. Masson*, 501
22. If the executors of a purchaser under a decree refuse to pay the purchase-money, they cannot be compelled to pay it unless in a suit instituted by the heir. *Lord v. Lord*, 503
23. Leave given, after replication, to file a supplemental answer to a bill for dower, in order to state a fine and non-claim omitted, though ignorance in the original answer. *Jackson v. Parish*, 505
24. Motion to extend common injunction granted, where the answer, which was filed on the same morning, was insufficient, and the trial was coming on the next day but one. *Munnings v. Adamson*, 510
25. If an executor admits that all the testator's debts, &c. have been paid, the court will on motion, order the income of a balance paid in by the executor, to be paid to the person entitled to the residue. *Dando v. Dando*, 510
26. Depositions taken, after decree, under a commission, or by the examiner, are published by order of court; if before the master, by his warrant. *Handley v. Billinge*, 511
27. Where the usual decree for accounts against a

personal representative, has been taken upon motion, the master ought to require the vouchers to be produced, although the answer is not replied to. *Davenport v. Davenport*, 512

### PROCESS.

Where a messenger has been sent upon a return of *cepi corpus*, and the defendant is in K. B. prison upon mesne process, a *habeas corpus* must next be obtained. *Neame v. Wagstaff*, 389

### PROCHEIN AMY.

The court will remove a next friend and appoint a new one, where the former is so connected with a defendant, having an interest adverse to that of the infants, as to make it probable that their interest will not be properly protected by him. *Peyton v. Bond*. *Peyton v. Robinson*, 390  
See NEXT FRIEND.

### PRODUCTION OF BOOKS, &c.

A party ordered to produce books, &c. before the master is bound to leave them if the master thinks fit so to direct. *Sidden v. Liddiard*, 388

### RESIDUE.

If an executor admits that all the testator's debts, &c. have been paid, the court will on motion, order the income of a balance, paid in by the executor to be paid to the person entitled to the person entitled to the residue. *Dando v. Dando*, 510  
See CONVERSION. WILL, 3, 8, 9.

### RESTORING.

Bill restored, though the order to dismiss was not obtained till after a considerable interval since the last proceeding in the cause, and though the plaintiff had acquiesced in the order; the suit being one in which the main object was answered when an injunction was obtained. *Barfield v. Nicholson*, 494

### SALE UNDER DECREE.

1. A. purchased for B., but without authority, an estate sold under a decree. B. died without adopting the purchase: the order *nisi* was, nevertheless, obtained. The court refused to order B.'s executors to pay the purchase money; and, on the heir declining the purchase, discharged the order *nisi*, and directed a re-sale. *Lord v. Lord*, 503
2. If the executors of a purchaser under a decree refuse to pay the purchase money, they cannot be compelled to pay it unless a suit be instituted by the heir. *Ibid*

### SALE OF DIVIDENDS.

See DIVIDENDS.

### SETTLEMENT.

See PARENT AND CHILD. SPECIALTY CREDITOR, 1, 2.

### SHERIFF.

See EQUITY, 2.

### SOLICITOR.

One of two solicitors, who were partners, became bankrupt; the assignees excluded the other from interfering with the affairs of the partnership: The court nevertheless refused to order the assignees to deliver to him the papers belonging to the clients of the firm. *Davidson v. Napier*, 297

### SPECIALTY CREDITOR.

1. A husband made a post-nuptial settlement of 4000*l.* in favor of his wife and children, and then, in consideration of the 4000*l.* expressed to have been lent to him by the trustees of the settlement, made a mortgage to them of a real estate to secure that sum, and covenanted to repay it. The husband never, in fact, paid the 4,000*l.* to the trustees: hold, nevertheless, that they were specialty creditors of the husband. *Tanner v. Byne*, 160
2. A grant of an annuity to the grantor's sister, though expressed to be made for natural love and affection, may be proved to have been made in consideration of her marriage, and will entitle her to rank as a specialty creditor of the grantor. *Tanner v. Byne*, 160

### SPECIFIC PERFORMANCE.

If A. in contracting with B. falsely represents himself to be the agent of C. and thereby obtains better terms, the court will notwithstanding, enforce the contract, unless A. knew that such would be the effect of the misrepresentation. *Fellowes v. Lord Gwydyr*, 63  
See MISREPRESENTATION.

### STATUTE OF LIMITATIONS.

1. The statute of limitations may be pleaded in bar to a bill, or prevent the setting up of outstanding terms. *Jermy v. Best*, 373
2. A bill filed by one creditor on behalf of himself and the others, will prevent the statute of limitations from running against any of the creditors who come in under the decree. *Sternale v. Hankinson*, 393

### SUPPLEMENTAL BILL.

Where a plaintiff, by the present practice of the court, may obtain that relief by petition, for which a supplemental bill was formerly necessary, and prefers the latter course; the supplemental bill is not demurrable, but the proceeding will be taken into consideration on the question of costs. *Davies v. Williams*, 5  
See LACHES.

### SUPPLEMENTAL ANSWER.

Leave given, after replication, to file a supplemental answer to a bill for dower, in order to state a fine and non-claim omitted, through ignorance, in the original answer. *Jackon v. Parish*, 505

### TENANT FOR LIFE.

A tenant for life of an estate settled in strict set-

element buys up some of the charges on the estate, and has them assigned to a trustee: he next purchases the ultimate remainder and has it conveyed to him subject to the subsisting charges: he then devises the estate subject to the charges that might be thereon at his decease; the intermediate remainders fail at his death; the charges so purchased are merged; and parol evidence is admissible to prove that the testator so intended. *Astley v. Miles*, 298  
**See CONVERSION. MERGER OF CHARGES. TIMBER. WILL, 4.**

**TERMS.**

**See OUTSTANDING TERMS.**

**TIMBER.**

Tenant for life, unimpeachable of waste, except in the park, demesne lands, and woods adjoining the capital messuage, there being no woods of that description, cannot cut timber in any of the woods that are either an ornament or shelter to the messuage. *Newdigate v. Newdigate*, 131

**TITHES.**

An exemption from tithes was claimed, as to certain copyholds, on the ground of unity of possession of the rectory, manor and lands in one of the greater monasteries dissolved by 31 H. 8. Other copyholds of the manor had belonged to the monastery at the dissolution, and were subject to tithe: held, nevertheless, that the exemption was good, because the monastery might have granted out the latter copyholds before the union of the rectory, and the former, after it. *Monck v. Huskisson*, 280  
**See PRACTICE, 6.**

**TRUST.**

- 1 Execution of a trust, created by will to purchase land to be added and closely entailed to testator's family estate, in possession of T. B. testator declaring that his object was to have a head to the family, and that if T. B. should die without male issue, or dispose of the family estate, the residue of his fortune should go to A. B or his nearest relative in the male line. *Woolmore v. Burrows*, 512
2. Testator having given an annuity to one of his next of kin, and expressed a reason for giving nothing to the others, gave the residue of his property to his wife, recommending to her and not doubting that she would consider his nearest relations as he would have done had he survived her: held that there is no trust for the next of kin, but that the wife takes the residue absolutely. *Sale v. Moore*, 534
3. Testator, after giving his real and personal estate to his wife in fee, said that he had given the same to her unfettered and unlimited, in full confidence that in her future disposition thereof, she would distinguish the heirs of his late father, by devising the whole of his estate together and entire to such of his father's heirs as she might think best deserved her preference. Held that no trust was created. *Meredith v. Heneage*, 549  
**See PERPETUITY.**

**USURIOUS DEBT.**

A testator directed that one of his residuary legatees should be answerable for all debts due to him from the father of the legatee. A debt, though usurious, must be deducted from the legatee's share. *Stanton v. Knight*, 482

**VENDOR AND PURCHASER.**

1. A piece of land imperfectly watered, was described, in the particular, as uncommonly rich water-meadow: held that this was not such a misrepresentation as would avoid the sale. *Scott v. Hanson*, 13
2. The vendor may confirm an order nisi, obtained by the purchaser if the latter neglect to do so. *Chillingworth v. Chillingworth*, 291
3. A. purchased for B., but without authority, an estate sold under a decree. B. died without adopting the purchase. The order nisi was nevertheless obtained. The court refused to order B.'s executors to pay the purchase-money; and, on the heir declining the purchase, discharged the order nisi, and directed a resale. *Lord v. Lord*, 503
4. If the executors of a purchaser under a decree refuse to pay the purchase money, they cannot be compelled to pay it, unless a suit be instituted by the heir. *Ibid*
5. The amount of deterioration of an estate pending a suit for specific performance having been ascertained by an issue, the purchaser was allowed it out of his purchase money, which he had paid into court under an order, with interest from the time when he paid in his money. *Ferguson v. Tudman*, 530

**VOLUNTARY SETTLEMENT.**

**See SETTLEMENT. FRAUD, 1.**

**VOUCHERS.**

Where the usual decree for accounts against a personal representative has been taken upon motion, the master ought to require the vouchers to be produced, although the answer is not replied to. *Davenport v. Davenport*, 512

**WASTE.**

**See TIMBER.**

**WEST INDIA ESTATE.**

*Semble*, that by a devise of a West India plantation, the stock, implements, utensils, &c. upon it, will pass. *Lushington v. Sewell*, 435

**WIDOW.**

The personal estate of an honorary freeman of the city of London, is in case of his dying intestate, distributable according to the custom of London, and his widow is not barred of her customary share by a settlement which is expressed to be in lieu of all dower, or thirds, or other portion at common law, or otherwise, out of his freehold and copyhold lands. *Onslow v. Onslow*, 18

## WILL.

1. Testator gave his real and personal estate to persons, whom he afterwards appointed his executors, in trust, in the first place to sell an advowson, and apply the proceeds in discharge of his debts and legacies, and, if they should be insufficient then to raise the deficiency, by sale or mortgage of his real estates, and directed his executors to retain their expenses, but did not expressly declare any trust as to his personal estate. Held, that the personal estate was primarily applicable to the payment of testator's debts. *Rhodes v. Rudge*, 79
  2. Tenant for life, unimpeachable of waste except in the park, demesne lands and woods adjoining the capital messuage, there being no woods of that description, cannot cut timber in any of the woods that are either an ornament or shelter to the messuage. *Newdigate v. Newdigate*, 131
  3. Testatrix gave her real and personal estate to trustees to sell, and directed that the proceeds of her real estate should be taken as part of her personal estate, that out of the moneys to arise by such sale, and out of all other her personal estate, her legacies should be paid, and gave the residue to A. for life, with remainder over: held that the real estate was absolutely converted into personalty, and that some of the legacies, which had lapsed, belonged to the residuary legatee, and not to the heir. The legacies not having been paid within a year after testatrix's death, A. is not entitled to that year's income, but it forms part of the capital of the residue. *Amphlett v. Parke*, 275
  4. A feme covert having power to dispose, by will, of personal property, and of a real estate at N., by her will, after reciting the power, gave several pecuniary legacies, and then gave to her husband, her fields and house at N., likewise the remainder of her personalty, and all she might die possessed of after payment of her debts, legacies, and funeral and testamentary expenses: held that the husband took a life estate only in the realty, notwithstanding the gift to him of all the testatrix might die possessed of. *Monk v. Mawdsley*, 286
  5. A testator gave all his real and personal estate to trustees in trust as to one moiety, for A. for life, with remainder to her children, and, as to the other moiety, for B. and her children, in like manner. By a codicil, he declared that his estates should not be divided equally between A. and B., but in proportion to the number of their children; and he left A. and B. jointly, his residuary legatees. By another codicil, in order to prevent disputes, he gave one of his estates to A. and her heirs, and the other to B. and her heirs, the number of their children nearly equalizing the value of the two estates. In a subsequent codicil he mentioned that he had bequeathed the first estate to A. and her children, and the second to B. and her children: held that A. and B. were entitled to these estates for their lives only, with remainders to their children, and that they were not entitled to the personal estate absolutely, but for their lives only, with remainders to their children, and in shares proportioned to the number of their children. *Lushington v. Sewell*, 435
  6. A testator directed that one of his residuary legatees should be answerable for all debts due to him from the father of the legatee. A debt, though usurious, must be deducted from the legatee's share. *Stanton v. Knight*, 482
  7. Execution of a trust, created by will, to purchase land to be added and closely entailed to testator's family estate, in possession of T. B. testator declaring that his object was to have a head to the family; and that if T. B. should die without male issue, or dispose of the family estate, the residue of his fortune should go to A. B. or his nearest relative in the male line. *Woolmore v. Burrows*, 519
  8. Testator having given an annuity to one of his next of kin, and expressed a reason for giving nothing to the others, gave the residue of his property to his wife, recommending to her and not doubting that she would consider his nearest relations, as he would have done if he had survived her. Held, that there is no trust for the next of kin, but that the wife takes the residue absolutely. *Sale v. Moore*, 534
  9. Testator after giving his real and personal estate to his wife in fee, said that he had given the same to her, unfettered and unlimited, in full confidence that, in her future disposition thereof, she would distinguish the heirs of his late father by devising the whole of his estate together and entire, to such of his father's heirs as she might think best deserved her preference. Held that no trust was created. *Meredith v. Heneage*, 542
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- A witness who had answered some of the interrogatories, but refused to answer the others, was ordered to answer those interrogatories within four days or to stand committed. *Austin v. Prince*, 348
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REPORTS

OF

C A S E S

DECIDED IN THE

HIGH COURT OF CHANCERY,

BY

THE RIGHT HON. SIR ANTHONY HART,

AND

THE RIGHT HON. SIR LAUNCELOT SHADWELL,

VICE-CHANCELLORS OF ENGLAND.

---

BY NICHOLAS SIMONS,  
OF LINCOLN'S INN, ESQ. BARRISTER AT LAW.

---

WITH NOTES AND REFERENCES,

TO BOTH ENGLISH AND AMERICAN DECISIONS;

BY JOHN A. DUNLAP,

COUNSELLOR AT LAW.

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LORD LYNDHURST, LORD CHANCELLOR.

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VICE-CHANCELLORS.

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SIR J. SCARLETT,      SIR C. WETHERELL,  
ATTORNEYS GENERAL.

---

SIR N. C. TINDAL, SOLICITOR GENERAL.

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## CASES IN CHANCERY

BEFORE

### THE VICE-CHANCELLOR.

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\*ANSTRUTHER v. CHALMER.(a)

[\*1]

1825 ; 8th February. 1826 ; 6th February.—*Domicil—Construction.*

A native of Scotland domiciled in England, having personal property only, executed, during a visit to Scotland, and deposited there, a will prepared in the Scotch form, and died in England ; held that the will was to be construed according to the English law.

THE object of this suit was to have it declared that a deposition or will of personalty, made in the Scotch form, by Miss Catherine Anstruther, was to be construed according to the law of Scotland.

Miss Anstruther was a native of Scotland. In 1801, she came to reside in England, and was domiciled in London up to the time of her death. She was, however, in the habit of going occasionally to visit Scotland. During her stay in Edinburgh in the year 1814, on one of those visits, she employed a writer to the signet in Edinburgh to prepare the instrument in question. It was dated the 16th of December, 1814, and was entirely in the Scotch form, and began as follows :

"I, Miss Catherine Anstruther, daughter of Sir Robert Anstruther, of Balcaskie, baronet, for the love \*and affection I have and bear to Sir [\*2] Alexander Anstruther, of Caplie, recorder of Bombay, my brother, and for other good causes and considerations me moving, do hereby, with and under the burdens, declarations and reversions after specified, give, grant, alienate, assign and dispose to and in favor of the said Sir Alexander Anstruther, and his heirs whomsoever, and assignees, heritably and irredeemably, all and sundry lands, tenements, annual rents and other heritages, and all heritable and moveable means and estate, of whatever nature or denomination, and wheresoever situated." The instrument then went on, at considerable length, to state that all her bonds, securities for money, rights of action, &c., were thereby conveyed ; and, after containing, in the usual form of such a clause in a Scotch deed, an obligation to infest Sir Alexander Anstruther, and his foresaids, in all her lands and heritages, and power to him to call and pursue for, uplift, receive

(a) The editor is indebted to his friend Mr. Stuart for the report of this case.

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 1825.—*Anstruther v. Chalmers*.
 

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and discharge or assign the debts, goods and effects thereby disposed and conveyed, it appointed him sole executor in the following manner :—

“ And I hereby nominate and appoint the said Sir Alexander Anstruther to be my sole executor and intromitter, with my moveable estate, hereby excluding and debarring all others my nearest in kin from the said office.” Then followed a clause reserving a power of revocation of this instrument, and consenting to its registration in the books of council and session, and appointing procurators for that purpose.

As soon as Miss Anstruther had executed this instrument she deposited [\*3] it in the hands of the writer to the \*signet by whom it had been prepared.

Some time afterwards she returned to England, and continued, as previously, to visit Scotland occasionally. In September, 1820, she died at her house in London. She never altered or revoked the instrument in question, and it remained in the hands of the writer to the signet till after her death. She left no real estate.

Sir Alexander Anstruther, the executor and legatee, had died in 1818, having made his will and thereby appointed the plaintiff in this suit his executrix.

In March, 1821, letters of administration of the estate of Miss Anstruther were granted by the ecclesiastical court to James Chalmers and Alexander Fraser, as the attorneys of Elizabeth Campbell, the sister and only next of kin of Miss Anstruther.

This bill was filed by the executrix of Sir Alexander Anstruther against Mr. Chalmers, Mr. Fraser and Mrs. Campbell, charging that, according to the law of Scotland, the disposition to Sir Alexander Anstruther in the instrument executed by Miss Anstruther, was an absolute disposition, and did not lapse by his death in the life-time of Miss Anstruther, but subsisted for the benefit of his child or children ; inasmuch as the instrument was intended to take effect according to the law of Scotland, and ought to be construed according to the law of that country.

It was admitted that Miss Anstruther was domiciled in England at the time of her death ; and that, according to the law of Scotland, (if the instrument were to be construed by that law) the bequest to Sir Alexander [\*4] \*Anstruther, in the form contained in the deed, would not lapse by his death in Miss Anstruther's life-time.

*Mr. Solicitor General* and *Mr. Oliphant*, for the plaintiff :—This question is, whether a will, being made in Scotland according to the Scotch form, and deposited there, shows sufficiently that it was the intention of the party that, as to personal property, the rules of construction of the Scotch law should govern the instrument. If there had been a memorandum indorsed on a will so made and deposited, declaring that it was the intention of the party that the instrument should take effect as a Scotch will, and be construed according to the law of Scotland, there can be no doubt that this court would give effect to it accordingly, and would consider, in the present case, the gift to Sir Alexander Anstruther as if it were expressed as a gift to him, and, if he died in the tes-

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tatrix's life-time, then to his heirs. It must be admitted that the *forum domicilii* is to prevail, as to the distribution of personal property, in the case of testacy as well as of intestacy; but it ought not to prevail where the intention of the party is manifested that the construction of the instrument should be governed by the law of the country in which it is executed, deposited and recorded. In Vattel, lib. 2, c. 8, p. 175, it is said, in discussing the right of a foreigner to make a will: "As to the form or solemnities appointed to settle the validity of a will, it appears that the testator ought to observe those that are established in the country where he makes it, unless it be otherwise ordained by the law of the state of which he is a member;" and he then adds: "I speak here of a will which is to be opened in the place where a person dies."

Mr. Hart, Mr. Knight, and Mr. Stuart, for the defendants:—It is not [\*5] necessary to argue what the construction ought to be if this were the case of a contract, instead of a testamentary instrument; for the law of the country in which the testator was domiciled at his death, must, as to personal property, govern the construction of a testamentary instrument. And, in the present case, the ecclesiastical court is the proper place to try this question, for the grant of administration to the next of kin has decided this case. The letters of administration express that they were granted to Fraser and Chalmers "for the use and benefit of Elizabeth Campbell."

The Vice-Chancellor then directed the cause to stand over, that it might be ascertained whether the question had not been decided by the ecclesiastical court, and by the form of the letters of administration.

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1826; 6th February.—This day a certificate from the deputy register of the prerogative court was read to the court, which stated, in substance, that the words used in the grant of letters of administration, were those invariably used where the grant was to persons under a power of attorney from the party entitled to the representation; and that the words: "for the use and benefit" of that person, did not exclude the claim of other persons to share in the personal estate.

The Solicitor General and Mr. Oliphant, for the plaintiff:—This is entirely a Scotch instrument, and contains technical phrases wholly unintelligible, unless the Scotch law is applied to it. In Lord Kames' elucidations [\*6] of the statute and common law of Scotland, (b) Lord Hardwicke, in a letter to Lord Kames, stating the reasons why in the case of Gordon Park, a substitution in a Scotch tailzie was put on the same footing as an English remainder, lays down principles which are quite applicable to the present case. There can be no doubt that words might have been used as to the gift to Sir Alexander Anstruther, which, even according to the law of England, would have made it good to his representatives, and have prevented a lapse.

Mr. Hart, Mr. Knight, and Mr. Stuart, for the defendants, insisted that, as the



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question related to personal property, and the testatrix was domiciled in England, there was not enough to prevent the court from construing the will according to the law of England.

The VICE-CHANCELLOR : (c)—In this case, Miss Anstruther, who was born in Scotland but was domiciled in England, being on a visit in Scotland, caused her will to be prepared there by a writer to the signet, who made it in the Scotch form, so as to give an absolute interest in all her real and personal estate to Sir Alex. Anstruther, who afterwards died in her life-time. This will, after the death of Miss Anstruther, was proved in England. Miss Anstruther at her death had no real estate; and, it being admitted that, by the law of Scotland, the gift to Sir Alex. Anstruther was not lapsed by his death [\*7] in the life-time of Miss Anstruther, the question in this cause is, \*whether

Miss Anstruther's personal property would, under this instrument, belong to the representative of Sir Alex. Anstruther, or the next of kin of Miss Anstruther, as in the case of a failure by lapse.

By the law of England, where an absolute interest in personal property is given by a testamentary instrument, there the gift fails if the donee die in the life-time of the testator; [1] and Miss Anstruther being domiciled in this country, the law of England must prevail in this case. [2] The next of kin are therefore entitled.

Bill dismissed.

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### FREE V. HINDE.

1827; 16th June.—*Post obit.*—*Receiver.*

Where a tenant in tail in remainder had agreed to pay a sum of money after the death and failure of issue of his brother, the tenant in tail in possession, and had secured the money by a mortgage of the estate, and covenanted to levy a fine and suffer a recovery to give effect to the mortgage, but on coming into possession of the estate, refused to perform his covenant, the court appointed a receiver of the rents.

THE defendant was tenant in tail male, in remainder expectant upon the decease of his brother John Jacob Hinde without issue male, of certain real estates in Essex, and also of estates directed to be purchased with 12,349*l.* 15*s.*

(c) Sir John Leach.

[1] Where a legacy is given to a person and his *executors and administrators*, the addition of those words does not prevent the lapse of the legacy, by the death of the legatee in the life-time of the testator, being considered as only descriptive of the interest bequeathed; and because those who take by representation only, cannot be entitled to any thing to which the person they represent never had any title. *Shuttleworth v. Greaves*, 4 Myl. & Cr. 38. By the laws of New York, a devise or legacy to a child or other descendant, does not lapse by death during the life-time of the testator, provided the devisee or legatee leaves a child or other descendant who shall survive the testator. 2 R. S. 9, § 52.

[2] The law of the country in which the deceased was domiciled at the time of the death, not only decides the course of distribution or succession, as to personalty, but regulates the decision as to what constitutes the last will. *Price v. Dewhurst*, 4 Myl. & Cr. 76. Affirming S. C. 8 Sim. 279. See further *Thornton v. Curling*, 8 Sim. 310. *Decouche v. Savetier*, 3 Johns. Ch. Rep. 210.

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three per cent. reduced annuities, 1,948*l.* 8*s.* 8*d.* bank stock, 1,568*l.* 12*s.* 8*d.* three per cent. consols, and some other smaller sums of stock. John Jacob Hinde had been an idiot from his birth, and a commission of lunacy was in force against him. By \*indentures dated the 4th and 5th of May, [\*8] 1808, in consideration of 3,000*l.* paid by the plaintiff to the defendant, the latter covenanted that, in case John Jacob Hinde should die, in his lifetime, without issue male, he would, within six months afterwards, pay 10,000*l.* to the plaintiff; and he conveyed a moiety of the Essex estates (subject to his brother's estate in tail male therein) to the plaintiff in fee, and covenanted to levy a fine *sur conuzance de droit come ceo*, &c. thereof, before the end of the then present term, to the use of the plaintiff in fee, and also, within six months after the death of his brother without issue male, to procure an order of the court of chancery, and to do all other necessary acts for vesting in and assigning to the plaintiff a moiety of the sums of stock before mentioned. And it was declared that the plaintiff should stand seised and possessed of the moiety of the estates and sums of stock, upon trust, in case J. J. Hinde should die in the defendant's life-time, without issue male, and default should be made in payment of the 10,000*l.*, to raise that sum by sale or mortgage: and the defendant further covenanted that, in the event of his brother's death as before mentioned, he would, within six months afterwards, suffer a recovery of the moiety of the Essex estates, for the purpose of vesting the fee in the plaintiff, upon the trusts aforesaid.

John Jacob Hinde died in September, 1826, without issue. The defendant not having done any of the acts he had covenanted to perform, the plaintiff filed a bill against him, praying for a specific performance of the covenants, and to have a moiety of the sums of stock, and of the dividends accrued thereon since the death of J. J. Hinde, transferred and paid into court; \*for a receiver of the rents of a moiety of the Essex estates; and for [\*9] an injunction to restrain the defendant from mortgaging or disposing of any of the property included in the security, or receiving the income thereof.

The defendant, in his answer, stated that, at the time when the 3,000*l.* was paid to him, he was (as the plaintiff knew) in embarrassed circumstances: that he and his brother were then of the respective ages of thirty-nine and fifty-two years: that the plaintiff also knew that J. J. Hinde had been an idiot from his birth, and that there was not any chance of his recovering his faculties, or having lawful issue: that, according to the respective ages of himself and his brother at the time when the money was advanced, the value of a sum of 10,000*l.* to be paid by the defendant in case he should survive his lunatic brother, was much more than 3,000*l.*: that, in Easter term, 1824, he and his son Jacob William Hinde had levied a fine of the Essex estates to T. Metcalfe, the uses of which were declared to be for securing to that gentleman the payment of 20,500*l.*: and that the defendant had filed a bill against the plaintiff for the purpose of setting aside the deeds of May, 1808, upon repayment of the 3,000*l.*, with interest at 4*l.* per cent. from the time it was advanced; and he

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submitted that the plaintiff ought not to be permitted to avail himself of his security, but ought to deliver it up to be cancelled, upon payment of the 3,000*l.* and interest.

Mr. *Sugden* and Mr. *Girdlestone*, for the plaintiff:—It is nearly twenty years since the plaintiff lent his money, with the chance of losing the [\*10] whole of it. As \*the defendant refuses to perform his covenant to levy a fine, the plaintiff's security is no better than a life estate. If the court were to permit the defendant, under these circumstances, to continue to receive the rents of the estate, what security could it give the defendant that, at the hearing of the cause, he should not be a loser? It is no answer to the lender to tell him that the mere payment of money into court is all that he can have, whilst the borrower is to be allowed to receive the profits of the estate, to enable him to carry on the contest and protract the ultimate decision.

Mr. *Heald* and Mr. *Koe*, for the defendant, referred to *Curling v. Marquis Townshend*,<sup>(a)</sup> and *Marsack v. Reeves*;<sup>(b)</sup> and contended that, as the defendant was ready to pay the principal money and interest into court, a receiver ought not to be appointed.

Mr. *Sugden*, in reply:—The equity administered in cases of this sort has been carried infinitely too far. *Marsack v. Reeves* was an extreme case; one which the counsel for the defendant felt they could not support, the inadequacy being so great. But it is yet uncertain what may be the result of that case at the hearing.

The VICE-CHANCELLOR:<sup>(c)</sup>—It is only reasonable, under the jurisdiction which is exercised in these cases, that, upon payment into court of the money actually advanced, together with interest, the court should interfere, [\*11] provided it can \*see that the interposition will not be of any ultimate injury to the lender.

I think I perfectly well understand the order made by Lord Eldon in the case of *Curling v. Marquis Townshend*. It was there admitted that Lord Townshend's title to the estate was absolute, and that the judgment of the plaintiff was a charge on the *corpus* of the estate; so that the plaintiff would be secure in the event of a decree in his favor. In this case, however, it is far otherwise. The whole security now possessed by the party making this motion, is contingent on the life of the borrower of the money. A contract has been entered into for making the security effectual by letting in the incumbrance, which now extends only to a life estate, upon the reversion. If this had been done, the lender would have had security for the larger amount, in case of its being found to be ultimately due. That would be consistent with the principle of the court, which places the funds in a state of security pending litigation.

It would be the height of injustice, after near twenty years, during which the plaintiff has confided in the engagement of Major Hinde to give him an inde-

<sup>(a)</sup> 19 Ves. 628.<sup>(b)</sup> 6 Madd. 108.<sup>(c)</sup> *Ex relatione.*

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1827.—Hulme v. Coles.

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feasible interest in the estate for the security of the contract, now to allow him to enjoy the estate upon a mere deposit of the sum originally borrowed, with the interest. If he should come into court and say : " I have done all I contracted to do," it would be pretty much of course to grant him this indulgence. He may probably prefer to secure the estate to his children, by refusing to cut off the entail, as other men \*have done. I shall [\*12] not look to his motives ; but the plaintiff must, at all events, be secured.

Supposing the money were to be tendered under such circumstances, it would be a question whether payment into court would be the proper course to satisfy the justice of the case, or whether the payment should not be made, at once, to the party himself.

It is impossible wholly to reconcile oneself to the doctrine of courts of equity in oversetting these contracts, in the extent to which it has been carried. I never could reconcile myself to a case where the court gives eventually the mere sum advanced, with simple interest, whilst the accumulation at compound interest, would probably double the sum.

Motion granted.

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HULME v. COLES.

1827 ; 20th July.—*Surety.*

A surety is not discharged by the creditor taking from the debtor a cognovit in an action he had brought against the debtor, with a stay of execution until a day earlier than that on which judgment could have been obtained in the regular course.

A MOTION was made, in this cause, for an injunction to restrain the defendant, the administrator of Catherine Coles, deceased, from proceeding in an action which he had commenced against the plaintiff for recovering money due on a bond given to the deceased, in which the plaintiff had joined, as surety, with one Burckhardt. The facts admitted by the answer, and relied upon in support of the motion, were that, in June, 1817, Catherine Coles had commenced an action upon the bond against Burckhart, and, on \*the 23d of that month, without the plaintiff's privity, took a cognov- [\*13] it from him for the amount of the debt, with a stipulation that no judgment should be entered up or execution issued until the 1st of August, following. The plaintiff insisted that this proceeding was a giving of time to the principal, which discharged him, the surety, from all liability under the bond.

Mr. *Shadwell* and Mr. *Whitmarsh*, in support of the motion, said that, as by the stipulation in the cognovit execution was stayed, it was a clear case of giving time ; and that, therefore, the surety was discharged : and they cited *Rees v. Berrington*.(a)

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 1827.—Grant v. Grant.
 

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Mr. *Sugden*, and Mr. *Campbell*, for the defendant :—A surety is never discharged by the delay of the creditor in suing the principal debtor, unless the creditor makes an agreement with the principal by which he is prevented from suing him.[1] In this case the creditor's remedy against the principal was never lost, nor were his hands tied for a moment : by the arrangement, the remedies of the surety were not diminished or affected in any manner. It is clear that, in the usual course, judgment could not have been obtained in the action until long after the 1st of August, and therefore the period for getting the benefit of the action has been shortened, and not extended. *Prendergast v. Devey* ;(b) *Samuell v. Howarth* ;(c) *Davey v. Prendergrass* ;(d) *Boulbee v. Stubbs*.(e)

[\*14] \*The VICE-CHANCELLOR :—The principle of discharging a surety by the giving of time by the creditor, is a refinement of a court of equity : and I will not refine upon it. By the arrangement complained of, time was not given, but the remedy was accelerated.

Motion refused.[2]

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#### GRANT v. GRANT.

1827 ; 28th July.—*Practice.—Amendment.*

Motion for leave to amend, without prejudice to a *ne exeat*. refused.

MOTION to amend the bill, without prejudice to the writ of *ne exeat* which had issued in the cause, on payment of 20s. costs. The amendments were stated in the affidavit in support of the motion, and the bail had been served with notice, in compliance with a direction given by the Vice-Chancellor, when the motion was mentioned to him on a preceding day.

Mr. *Shadwell* and Mr. *M'Arthur*, for the plaintiff :—The proposed amendments do not tend to vary or withdraw any of the statements in the bill, but only to put the case in a more perfect form upon the record. Courts of law permit declarations to be amended after plea pleaded, and even after verdict, without paying any regard to the bail. Where a writ of *ne exeat* issues, the sheriff is not bound to take any bail at all ; *Boehm v. Wood* ;(f) but the bail when taken, are never discharged without a special application.

(b) 6 Madd. 124.

(c) 3 Mer. 272, see 278.

(d) 4 B. & A. 187.

(e) 18 Ves. 20, see 26.

(f) 1 Turn. & Russ. 332.

[1] Vide *King v. Baldwin*, 2 Johns. Ch. Rep. 559. *Rathbone v. Warren*, 10 Johns. Rep. 587. *Sailly v. Elmore*, 2 Paige, 497. *Neimeciewicz v. Gahn*, 3 Paige, 614. S.C. 11 Wend. 312. Amer. Ch. Dig. Principal and Surety, III., V.

[2] The liability of a surety in a bond is not discharged by the delay of the creditor in suing for the debt, or by the circumstance of the principal debtor afterwards executing to the creditor another bond for a larger sum. *Eggs v. Everett*, 2 Russ. 381.

1827.—*Macnab v. Mensal.*

\*[The VICE-CHANCELLOR :—The plaintiff is entitled to amend as a [\*15] matter of course.] [1]

As no order could be found to show the practice of the court on applications similar to the present one, it was thought best not to obtain the order as a matter of course, but to bring the point before the consideration of the court. Bills are allowed to be amended without prejudice to injunctions.[2] *Sharp v. Ashton(b)*; *Pratt v. Archer.(c)*

The other cases referred to were *Raynes v. Wyse,(d)* *Pannell v. Taylor,(e)* and *Ray v. Fenwick.(f)*

Mr. *Heald* appeared for the bail, and Mr. *Pemberton* for the defendants :

But the Vice-Chancellor, without hearing them, said that he had an unqualified aversion to the writ of *ne exeat*, but should abstain from expressing any opinion that might prejudice the question, as he was not required to do it in that stage of the cause ; that he had no authority over the bail, but that the plaintiff's counsel, if they were satisfied with the analogy of the practice at law, might take an order to amend, without the special reservation, or might abandon their motion, but that, in either case they must pay the costs.[3]

\*MACNAB V. MENSAL.

[\*16]

1827 ; 28th July.—*Practice.—Process.*

If the messenger ordered to bring up a defendant dies, the sergeant-at-arms will be ordered to go.

A MESSENGER, who had been ordered to bring up the defendant upon the sheriff's return of *cepi corpus*, died. The Vice-Chancellor, on the motion of Mr. *Simpkinson*, ordered the sergeant-at-arms to go.

KIRKPATRICK V. MEERS.

1827 ; 28th July.—*Practice.—Attachment.*

Where a defendant, after notice of the plaintiff's intention to issue an attachment unless an order for time is obtained, procures the order, but is unable, on account of the press of business, to get it drawn up, and omits to give the defendant notice of the order until the attachment is sealed, he cannot set aside the attachment.

THE time allowed for the defendant to put in his answer after appearance, expired on the 7th of June. On the 11th, notice was given to the defendant's

(b) 3 V. & B. 144.

(c) 1 Sim. & Stu. 433.

(d) 2 Mer. 472.

(e) 1 Turn. & Russ. 96.

(f) 3 Bro. C. C. 25.

[1] Vide *Hickens v. Congreve*, 1 Sim. 601, and note, *ibid*.

[2] Vide *Renuick v. Wilson*, 6 Johns. Ch. Rep. 81. 1 Hoff. Ch. Prac. 301. *Home v. Watson*, post, 85. *Pickering v. Hanson*, post, 488.

[3] S. C. 5 Russ. 190, where the amendments not varying the case, the writ was sustained. It is a general rule that an amendment of the bill puts an end to all process of contempt. 1 Hoff. Ch. Prac. 298.

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 1827.—*La Terrierre v. Bulmer.*


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clerk in court that an attachment would be issued against the defendant, if an order for time to answer were not obtained. On the 15th, an order for time was obtained; but (as was stated in the affidavits filed for the defendant) it was not drawn up, on account of the press of business, until the 23d. On the 18th, the plaintiff's solicitor gave to the defendant's solicitor notice of his intention to seal an attachment. On the next day it was actually sealed, and the plaintiff's solicitor then wrote to the defendant's solicitor, informing him of his intention to put the writ into the sheriff's hands. On the 20th, the plaintiff's solicitor was told that an order for time had been obtained; and on the 23d, the attachment was executed. Mr. Wakefield, for the defendant, now moved to dis-  
[\*17] charge \*the attachment for irregularity. He relied on *Barritt v. Barritt*.(a)

Mr. Pepys, for the plaintiff, said that *Barritt v. Barritt* did not apply, not only as the defendant had notice of the plaintiff's intention to issue the attachment, but as the plaintiff had no notice that the order for time had been obtained, until after the attachment had been sealed; and that it was not executed until fifteen days after the time at which it might have been executed.

The VICE-CHANCELLOR:—In *Barritt v. Barritt*, the attachments were sealed against good faith; and, upon that principle, the Lord Chancellor set them aside. But in this case there is a total absence of all surprise; therefore refuse the motion with costs.[1]

[\*18]

\*LA TERRIERRE V. BULMER.

1827; 30th and 31st July.—*Will.—Construction.—Tenant for life of residue.*

The tenant for life of a residue, which is directed to be laid out in certain securities, is entitled to the income accrued in the first year after the testator's decease on such parts of the testator's estate as are invested, at his death, in the proper securities, and on such parts as are afterwards so invested within the same year; but the income, before such investment, forms part of the capital of the residue.

SIR FENWICK BULMER, deceased, by his will, dated the 23d of April, 1824, after making certain specific devises and bequests, and bequeathing an annuity and several pecuniary legacies, disposed of his residuary estate in the following words: "And as to all other my stocks, funds and securities for money, whether in England or elsewhere, and all the rest, residue and remainder of my estate and effects, whatsoever and wheresoever, whether real or personal, of or to which I am in any way seised, possessed or entitled, or over which I have any right or power of disposition, or of or to which I, or any person or persons

(a) 3 Swan. 395.

[1] Vide *Gaylor v. Fitzjohn*, 1 Sim. 386. An attachment was discharged without costs, where the defendant had used due diligence in obtaining an order for time to answer. *Taylor v. Fisher*, 6 Sim. 566.

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1827.—*La Terriere v. Bulmer.*

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whomsoever in trust for me, am, is or are seised or possessed or entitled in possession, reversion, remainder or expectancy, and by me not otherwise devised or bequeathed, I give, devise and bequeath the same unto the said William Bulmer, Isaac Jackman and Charles Smith, their heirs, executors and administrators respectively, according to the several natures and qualities thereof, upon trust, with all convenient speed after my decease, to make sale and absolutely dispose of, by public auction, such parts of my said residuary estates and effects as shall consist of freehold, copyhold or leasehold estates, and such other parts of my said residuary estates and effects as, from the nature thereof respectively, cannot otherwise be converted into money, unto any person or persons, for the best price or prices that can be reasonably gotten for the same : \*and upon further trust to call in, collect and convert into money [\*19] all securities for money, and all other my residuary personal estate and effects. And I do hereby declare and direct that they, my said trustees, and the survivors and survivor of them, and the heirs, executors and administrators of such survivor, shall stand possessed of my ready money, and of the moneys to be produced by the sale, collection and conversion of my said residuary real and personal estates and effects, subject to the payment of my just debts, funeral and testamentary expenses, and the several legacies bequeathed by this my will, or to be bequeathed by any codicil or codicils hereto, upon, with and subject to the several trusts, powers and provisions hereinafter expressed and declared of and concerning the same (that is to say) as to one equal third part thereof, in trust for the said Henry Morgan Bulmer, his executors, administrators and assigns ; and, as to the two remaining or other third parts or shares of proceeds to arise and be received from the sale and conversion of my said residuary estates and effects, and of the moneys to be produced by the sale, collection and conversion thereof, upon trust to lay out and invest the same two-third parts, when and as the same shall come into their hands, in the names or name of the trustees or trustee for the time being thereof, in or upon any of the government or parliamentary stocks or funds of Great Britain, or on real securities in England or Wales." The testator then directed his trustees to stand possessed of the stocks, funds and securities so to be acquired and purchased as aforesaid, in trust for Mrs. La Terriere, for life, for her separate use, and after her decease, for her children, in equal shares, to be vested interests in them at the usual periods.

\*The testator died in May, 1824. At his decease his personal estate [\*20] consisted of stock in the funds, East India bonds and other public securities, shares in insurance offices and canals, mortgages, bonds, &c. Within a year after his decease the trustees sold his real estates, and invested the proceeds in the funds.

The bill was filed by the infant children of Mr. and Mrs. La Terriere, against their father and mother, the executors and trustees, and certain other parties ; and it prayed to have the usual accounts taken of the testator's real and personal estates, &c. ; that the trusts of the will might be carried into



1827.—*La Terriere v. Bulmer*

execution ; and that the plaintiffs might be declared to be entitled, as tenants in remainder of two-third parts of the testator's residuary estate, to have the whole of the interest that had arisen therefrom within the first year next after the testator's death, applied towards the increase and accumulation of their shares.

The decree, after directing the usual accounts to be taken of the testator's real and personal estates, ordered the master to ascertain and state to the court the amount of the interest or income accrued due, within the first year next after the testator's decease, on all such parts of his real and personal estate (not specifically disposed of) as, at the end of such first year, remained unsold, undisposed of, or unconverted by the defendants, the executors and trustees, and also the amount of the interest or income accrued due on all such parts of the real and personal estate (not specifically disposed of) as were sold, [\*21] undisposed of or converted within such first year, previous and up to the time of the sale, disposal or conversion thereof ; and also the amount of all interest or income accrued due, within such first year, on all stocks, funds or securities, in the purchase whereof the moneys received by the executors and trustees, on account of the real and personal estate, had been invested.

The master having reported as to the several matters referred to him as before stated, and that all the testator's funeral expenses, debts, legacies and annuities had been paid, the cause came on for further directions.

Mr. *Pepys* and Mr. *Benson*, for the plaintiffs and the defendants having the same interest, said that the testator had directed the proceeds of his estates to be invested in particular securities ; that several parts of the estates were not invested as the testator had directed ; and that he had given Mrs. *La Terriere* no interest except in the securities which he had directed to be purchased ; and that therefore she was not entitled to interest in respect of any parts of the estate that were not invested in the proper funds at the testator's death ; and they relied on *Sitwell v. Bernard*,<sup>(a)</sup> *Taylor v. Hibbert*,<sup>(b)</sup> and *Stott v. Hollingworth*.<sup>(c)</sup>

Mr. *Heald* and Mr. *Koe*, for the defendant, Mrs. *La Terriere*, said that she was entitled, on the principle of *Angerstein v. Martin*<sup>(d)</sup> and *Hewitt v. Morris*,<sup>(e)</sup> to the income arisen during the first year after the testator's [\*22] death on all his property ; that the reason why the court gave the tenant for life the first year's income, was that no part of the property was required for payment of debts ; that, at all events, she was entitled to the first year's income on what was found invested in the funds at the testator's decease, and on what was so invested by the executors within the first year ; and they referred to *Howe v. Lord Dartmouth*.<sup>(f)</sup>

The VICE-CHANCELLOR :—This is a question of construction upon the words of the testator's will. The tenant for life can claim no interest as to

(a) 6 Ves. 530.

(b) 1 Jac. &amp; Walk. 308.

(c) 3 Madd. 161.

(d) 1 Turn. &amp; Russ. 232.

(e) Ibid. 241.

(f) 7 Ves. 137.

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 1827.—*La Terriere v. Bulmer.*


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the securities which were not such as the testator directed for investment. But upon the authority of *Hewitt v. Morris* (which I have always considered to be rightly decided,) she is clearly entitled to interest on all parts of the estate that were found invested in the proper securities; and, upon the same principle, it should seem to follow that she is entitled to interest on subsequent investments in the right securities. The interest on the mortgages must be apportioned, as the tenant for life is entitled only to such part of it as accrued due after the testator's death.

"This court doth declare that the defendant, M. A. A. La Terriere, is, under and by virtue of the last will and testament of Sir F. B., the testator, &c. entitled to the income accrued due within the first year next after the testator's death, on two-thirds of all such parts of the testator's estate as, at the time \*of his death, existed in a proper state of investment accord- [\*23] ing to the directions of his will, and of the income accrued due, within the first year after the testator's death, on all investments according to the direction of his will, made by and with the moneys arising from the sale or conversion of two-thirds of all such parts of the said testator's estates as did not exist in such proper state of investment. And this court doth declare that the income accrued due, within the first year after the testator's decease, on two-thirds of such last-mentioned parts of his estate, previous and up to the respective times of the sale and conversion thereof, ought to form part of the capital of the two-thirds of the testator's residuary estate, by the said testator's will devised and bequeathed to the defendant, M. A. A. La Terriere, for life. And this court doth declare that, according to the aforesaid construction of the said testator's will, the said M. A. A. La Terriere is entitled to be paid 929l. 6s. 6d., being two-thirds of the aggregate amount of the third and fifth schedules annexed to the master's report, after deducting 20l. 19s. 9d. for so much of the interest on the mortgage from Mr. Goodwin, in the said third schedule mentioned, as accrued due in the testator's life-time, and 28l. 2s. 10d. for interest on the purchase moneys of lots 7, 9, &c. in the said fifth schedule mentioned." &c.[1]

Reg. lib. B. 1826.

[1] Where the interest or income of the testator's residuary estate is bequeathed to a legatee for life, and no time is prescribed in the will for the commencement of such interest, or the enjoyment of the use or income of such residue, the legatee for life is entitled to the interest or income of the clear residue, afterwards ascertained to be computed from the death of the testator. *Williamson v. Williamson*, 6 Paige, 298. Where legacies are payable at the end of a year from the testator's death, the legatee of a life interest in the residuary estate is not entitled to the whole interest on the amount of the general legacies for the first year; but the amount of the residuary estate at the death of the testator, for the purpose of settling the rights of the tenant for life, and the remainderman in the residuary fund, must be ascertained by taking from the estate such a sum for the general legacies as would, if invested at the death of the testator, produce the amount of such legacies at the end of the year, clear of expense; or by deducting five per cent. (that rate of interest, being two per cent. less than the legal rate, is adopted in analogy to the English rule, which gives three per cent. the legal rate being five) from the amount of the general legacies, and adding it to the capital of the residuary estate, and giving to the legatee of the life interest in such residue

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[\*24]

## BURTON v. HODSOLL.

1827; 24th July and 29th October.—Will.—Construction.—Conversion.—Escheat.

Testator gave a copyhold estate to trustees for his wife, until the leases to which it was subject expired, and directed that then it should be sold, and the proceeds be invested for the benefit of his children; but if his wife should die before the leases expired, that it should be immediately sold, and the proceeds disposed of as before. The wife survived the children, but died before the leases expired. The surviving trustee, who claimed the estate for his own benefit, was decreed to surrender it to the administrator of the children, but without prejudice to the rights of the customary heirs of either the testator or the children, or if any such heirs were in existence.

THOMAS LAMBE made his will, dated the 21st of June, 1804, and which was, in part, as follows: "I give and devise unto John Hodsoll, of Carey street, Lincoln's-Inn, esquire, and Joseph Boucock, of the Old Bailey, stone mason, and the survivor of them, or the executors or administrators of such survivor, all those my three freehold messuages in Furnival's-Inn-Court, Holborn, and also all my stock or shares in any of the public funds, and all money in hand, or debts due to me, to be placed in the three per cent. consolidated Bank of England, whereof I may be possessed of or entitled to, upon this special trust and confidence, that they my said trustees shall and do permit and suffer my wife, Maria Dove Lambe, to receive and take, for and during the term of her natural life, all rents and profits of my said messuages, and all other freeholds or leaseholds that I may be possessed of, and the interest, dividends and proceeds of the said stock or shares in the Bank of England, except the presents hereinafter mentioned, for the support and maintenance of herself and all my legitimate issue which I now have or may hereafter have by her, except as follows; that is to say, that in case my reputed son, known by the name of Thomas Lambe, shall live to attain the age of twenty-one years, I will and direct that they my said trustees shall and do, with all convenient

[\*25] \*speed, transfer and assign over to him 200*l.* stock of the three per cent. consols of the Bank of England, part of my stock or share therein, and

the income thereof from the testator's death. *Ibid.* The testator devised and bequeathed the residue of his estate and effects, real and personal to trustees, upon trust to convert the same into government securities in their own names, and to pay the interest and dividends thereof to M. S. for her life, and after her decease to pay and transfer such residue in equal moieties to the persons therein mentioned: it was held that the tenant for life was entitled to the interest of the residue, making interest as it stood at the time of the testator's death, until the end of one year, or so much of that year as should elapse before the conversion of the residue according to the direction of the will. *Douglas v. Congreve*, 1 Keen, 410. See farther *Amphlett v. Perke*, 1 Sim. 275. S. C. 2 Russ. & M. 221. *Dimes v. Scott*, 4 Russ. 195. Where the testator directs a sale with all convenient speed after his death, and directs the produce to be invested and the dividends to be paid to one for life, and the land remains unsold, the court considers twelve months as a reasonable time within which the estates ought to have been sold and the produce invested, and will give to the tenant for life the rents of the unsold estate from that time. *Vickers v. Scott*, 3 Myl. & K. 500. A legacy to a widow in lieu of her dower, draws interest from the death of the testator, where he has provided no other means for her support during the first year after his death; as in the case of a legacy to a child having no other means of support from the bounty of the testator. *Williamson v. Williamson*, ubi supra.

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1827.—Burton v. Hodsoll.

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to have no other claim on my property whatever, but to be in full of all bequest from me to him. And I do hereby further will and direct my said trustees to assign and transfer unto each and every of my lawful children the *like* sum of 400*l.* three per cent. consols, part of my stock or share therein, when and so soon as they shall respectively attain their respective ages of twenty-one years. And from and after the decease of my said wife, and all my children have attained the age of twenty-one years, I will and direct that my said trustees, or the survivor of them, or the executors or administrators of such survivor, do and shall make an equal division, among and between all my said children and their heirs, of my said three freehold messuages, either by sale or otherwise, as may be deemed most conducive to the interest of my said children; and also do and shall, in like manner, transfer over unto my said children all the remaining part of my stock and share in the three per cent. consols Bank of England, and all stock or shares my property, estate and effects, and to divide the same, in equal shares and proportions, among and between all my said children and their heirs."

The testator made a codicil to his will, in the words following: "I, Thomas Lambe, do hereby will and direct that my copyhold estate, situated in Church street, Islington, be transferred to my beloved wife, Maria Dove Lambe, until the expiration of the leases, and after that time, soon as convenient, or within one \*year, to be sold by public auction, the money to be placed [\*26] in the three per cent. Bank of England stock, for the benefit of my children and their heirs, as directed in the will. If it should please God to call her before that time of the expiration of the leases, the copyhold to be sold by public auction, soon as convenient, and the money placed as above directed. *N. B.* If there should not be money sufficient in my possession at the time of my decease to pay the fine of the copyhold, proving the will, and funeral expenses, my executors to sell, out of the three per cent. consols, 600*l.*, or a small sum, as may be required."

The testator died in May, 1806, leaving Maria Dove Lambe his widow, and Joseph Lambe, his only son and heir according to the custom of the manor of which the copyhold estate was holden, and Maria Dove Lambe the younger, and Harriott Lambe, his only other children him surviving; and which Joseph Lambe, Maria Dove Lambe the younger, and Harriott Lambe, were also his sole next of kin. Hodsoll and Boucock, the trustees, were shortly after the testator's decease, admitted tenants of the copyhold estate, and entered into the receipt of the rents and profits thereof. All the testator's children died infants, intestate and unmarried, at the following time: Maria Dove Lambe the younger, in July, 1807; Joseph, in March, 1809; and Harriott, in June, 1810. In August, 1807, the testator's widow married the plaintiff; and in October, 1823, she died. After her death the plaintiff took out separate letters of administration to her and her three children.

\*The bill alleged that Maria Dove Lambe's share of the proceeds of [\*27] the sale of the copyhold estate became upon her decease, vested or liable

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to be vested in her personal representative, or distributable between her brother and sister; or that, otherwise, it devolved, as being undisposed of by the will and codicil, to her mother, as the testator's widow, as to one-third part thereof; and as to another part thereof, to the legal personal representatives of Maria Dove Lambe the younger, as one of the testator's next of kin; and as to the residue thereof, to her brother and sister, as the other next of kin of the testator: that Joseph's share of the proceeds of the sale of the copyhold estate, and also his interest in the estate of his deceased sister, became, upon his decease, vested or liable to be vested in his personal representative; or otherwise the proceeds of the sale of the copyhold estate became vested in his only surviving sister, or otherwise his share or presumptive share thereof devolved, as being undisposed of by the will and codicil, to his mother, as the testator's widow, as to one-third part thereof; and as to another part thereof, to his sister, as one of the next of kin of the testator; and as to the residue thereof, to the legal personal representative of his deceased sister and himself, as the two other next of kin of the testator; that, upon the decease of Harriott Lambe, the proceeds of the sale of the copyhold estate, and also her interest in the respective estates of her deceased brother and sister, vested in her legal personal representative; or otherwise the proceeds of the sale of the copyhold estate devolved to her mother, as undisposed of by the will and codicil, and as widow of the testator and next of kin of her children: that the plaintiff, as the administrator [\*28] of his wife and her three children, was entitled to the proceeds of the sale of the copyhold estate, which ought to be considered as having been, by the effect of the codicil, converted into personalty: that he was ignorant who was the customary heir of the testator or his children. The bill prayed that the will and codicil, or at least the codicil, might be established, and the trusts thereof carried into execution; and that it might be declared that, under the circumstances, and by the means aforesaid, the plaintiff had become entitled to the moneys to arise by the sale of the copyhold estate: and that the estate might be surrendered to him.

Hodsoll, in his answer, said he had been advised that the plaintiff, as administrator of his wife and her children, was not entitled to any interest in the copyhold estate, but that the same, in the events that had happened, belonged, in equity, to the customary heir of the testator, if there were any such heir, and if not, then that he, the defendant, as the surviving trustee under the will, was entitled to the estate, for his own use, he being seised of the legal estate, and there being no equity to convert him into a trustee for any other person than the customary heir: and he had always understood that the testator was illegitimate; and that, his children being all dead, there was no heir of the testator then in existence, nor any heir of Joseph Lambe, or of Harriott Lambe.

At the testator's death the copyhold estate was subject to three leases, one of which expired in 1821, and the two others in 1825. The master, in [\*29] obedience to the decree, had advertised for the testator's customary

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heir : but no person was found to claim that character ; and the lord of the manor was not a party to the suit.

The cause now came on for further directions.

Mr. *Sugden* and Mr. *Sidebottom*, for the plaintiff :—By the codicil, the copyhold estate was converted, not for any partial purpose, but out and out into personalty. The sale was not to be delayed until the expiration of the leases ; for the testator says that, if it should please God to take his wife before that time, the copyhold should be sold by public auction. There is, therefore, no event in which it is not to be sold.

The children took immediate vested interests in their shares of the moneys to be produced by the sale ; for supposing (which is by no means certain) that they did not take vested interests in the legacies given them by the will, the words used in the codicil, “ as directed in the will,” do not qualify the prior gift, but relate merely to the investing.

If, however, the children did not take vested interests, the shares resulted to the customary heir ; and as the property was impressed, by the testator, with the character of personalty, it was unimportant whether the purposes, for which the estate was to be sold, were or were not existing at the time when the sale was to take place, and therefore the shares resulted to the heir, as personalty.

*Fletcher v. Ashburner*, (a) *Wright v. Wright*. (b)

Mr. *Shadwell* and Mr. *Pemberton*, for the defendant, Hodsoll :—“ The [\*30] question is, whether, in the events that have happened, there is any trust affecting the copyhold estate ; and, in order to decide that question, we must look at the manner in which the testator has dealt with his freeholds. Now he has given that part of his property to his trustees in trust for his wife, for her life, and, after her decease and his children attaining twenty-one, to be equally divided amongst those children. The division, therefore, was to depend upon the contingency of the children attaining twenty-one : and, if they did not attain that age, they were to take nothing under the will, and it is quite clear that there was no authority to sell the freeholds, except upon the happening of that event.

The words in the codicil, “ as above directed,” mean, as directed in the will ; therefore, there is no gift to the children of the produce of the copyhold estate, except in the event of their attaining twenty-one. All the leases of the copyhold were subsisting at the death of the surviving child. When the last lease expired, all the children, were dead ; and, therefore, the period at which the estate was to be sold, did not arrive until all the purposes for which the sale was directed to be made had failed ; and the court will not hold that real estate is converted into personalty, where there is no person for whose benefit the conversion is to take place ; and the consequence is that, as the legal interest remains in the defendant Hodsoll, he is entitled to hold the estate for his

(a) 1 Bro. C. C. 497.

(b) 16 Ves. 188.

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[\*31] own benefit. *Cruse v. Barley* ;(c) \**Burgess v. Wheate* ;(d) *Spink v. Lewis* ;(e) *Smith v. Claxton*.(f)

Mr. Sugden, in reply :—The property in question was, at all events, to be sold at the expiration of the leases. If the direction for sale, without its being in the power of any one to control it, impressed the estate with the character of personalty, how can it be contended that the conversion was not absolute ? It cannot alter the case that the widow died before the period of sale ; because the testator has said that, although she died before that period the property should be sold. It is immaterial whether the children took vested interests or not. But I apprehend that they took vested interests ; for the *corpus* of the property is to go to them on their attaining twenty-one, and there is no gift over ; and, therefore, the case did arrive in which it was necessary to sell the estate, as they took vested interests ; and the shares, having vested in the children, became transmissible as personal estate. But if the court should be of opinion that the children did not take vested interests, then there is a resulting trust for the heir: *Ackroyd v. Smithson*,(g) *Cruse v. Barley*,(h) and *Smith v. Claxton*.(i)

The Vice-Chancellor did not deliver any judgment in this case, but sent, to the parties, minutes from which the following decree was drawn up.

“ This court doth declare, that the said defendant ought not to be [\*32] permitted, in equity, to avail himself of \*the contingencies which have happened in the testator’s family, to retain the estate for his own benefit ; and it appearing, by the master’s said report, that no person hath been found to sustain a claim, to the said estate, as a resulting trust of real estate for the benefit of the customary heir, against the personal representatives of the next of kin claiming the same as converted, by the codicil, into the nature of equitable personal estate, this court doth declare that the said defendant, John Hodsoll, is bound to surrender the said copyhold estate to the plaintiff, as being the legal personal representative of the children of the testator, as if the said estate had been sold, and the money held by him for the purpose of distribution according to the trusts of the said codicil ; and, therefore, this court doth order and decree that the said defendant do, at the expense of the plaintiff, surrender the said copyhold estate to the plaintiff and his heirs, as being the legal personal representative of the testator’s children. But this court doth declare that the surrender of the said copyhold estate, so to be made to the plaintiff, is to be without prejudice to any question, which a customary heir of the testator, or of the children of the said testator, may raise, whether the money which would have arisen from the sale of the said copyhold estate, if the same had been sold by the defendant pursuant to the trusts of the codicil, would have vested in such children in the nature of real or personal estate.”[1]

(c) 3 P. W. 20.

(d) 1 Eden, 177.

(e) 3 Bro. C. C. 355.

(f) 4 Madd. 484.

(g) 1 Bro. C. C. 503.

(h) Ub. sup.

(i) Ub. sup.

[1] Vide *Willman v. Bowring*, 1 Sim. & Stu. 24.

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1827.—*Rushton v. Troughton.*

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\**RUSHTON v. TROUGHTON.*

[\*33]

1827; 4th August.—*Practice.*

An order to amend, and for defendant to answer amendments and exceptions at the same time, obtained before the filing of the report allowing the exceptions is irregular.

AFTER exceptions to the defendant's answer had been allowed, but before the master's report was filed, the plaintiff obtained an order for liberty to amend his bill, and that the defendant might answer the amendments and exceptions at the same time.

Mr. *Heald* and M. *Koe* now moved to discharge that order for irregularity, on the ground that it was obtained before the report was filed, and therefore before the court considered it to be made. They referred to Ord. Cha. Ed. Beames, 292: *Job v. Barker*,<sup>(a)</sup> *Whitehouse v. Hickman*,<sup>(b)</sup> and *Wynne v. Jackson*.<sup>(c)</sup>

Mr. *Bickersteth*, for the plaintiff, said that the delay in filing the report was merely accidental; and that if the order were discharged, the plaintiff might obtain, the same day, an order to the same effect, by petition, at the rolls.

The VICE-CHANCELLOR:—I cannot alter the practice of the court. All that I have to do is to inform myself of the practice, and to adhere to it. The report was a nullity until it was filed. The order of the 29th of October, 1692, is in these terms: "Whereas," &c. His Honor here read the order, and then granted the motion.[1]

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\**THE ATTORNEY GENERAL v. THE MAYOR OF ROCHESTER.*<sup>(d)</sup> [\*34]

1827; 6th August.—*Charity.*

Where charity estates are directed by the founder to be leased for 21 years, the court has no authority to order them to be leased for 99 years.

THE late Vice-Chancellor had directed a reference to the master to inquire whether it would be beneficial to the charity that the estates should be let for terms of ninety-nine years, instead of twenty-one, as required by the will of the founder.

The master had reported in the affirmative, and this was a petition to confirm the report.

The VICE-CHANCELLOR:—As an order for reference to this effect has been made by the judge who preceded me, I shall confirm the report; but I would not take such a lease under the order of this or any other court of equity. There must be an act of parliament to render legal such a deviation from the founder's intention.

(a) 2 Swans. 255.

(b) 1 Sim. & Stu. 102.

(c) 2 Sim. & Stu. 226.

(d) *Ex relatione.*

[1] Vide *Morgan v. Bruen*, 2 Hog. 195.



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 1827.—Ball v. Ball.
 

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[\*35]

## BALL v. BALL.(a)

1827; 6th August.—*Parent and child.—Jurisdiction.*

The court has no jurisdiction to deprive a father, though living in adultery, of the custody of his child, unless he brings the child in contact with the woman with whom he is so living; nor to order him to permit the mother to have access to the child, unless misconduct on his part is shown with reference to the management and education of the child.

THIS was the petition of Mrs. Ball and her daughter, Emily Owen Ball, a child about fourteen years of age, praying that the daughter might be placed under the mother's care, she offering to maintain her at her own expense, or that the mother might be permitted to have access to her daughter at all convenient times.

Mr. *Shadwell* and Mr. *Bickersteth*, for the petitioners, stated that the father was living in habitual adultery with another woman, on account of which Mrs. Ball had obtained a divorce in the ecclesiastical courts.

[The VICE-CHANCELLOR :—This court has nothing to do with the fact of the father's adultery, unless the father brings the child into contact with the woman. All the cases on this subject go upon that distinction, when adultery is the ground of a petition for depriving the father of his common law right over the custody of his children.] [1].

That does not appear to have been done by the father here : but the petition is in the alternative ; it prays for liberty of access. The child formerly lived with her mother, and occasionally was allowed to go to her father. On one of those occasions the father, without any communication with the mother, detained the daughter, and sent her to a school, and the mother was ignorant [\*36] for a long time what had become of her child ; and when, after most persevering search, the mother found out the school, the mistress refused to allow the mother to see the child, except in her presence. We admit that there is no case for taking away the father's authority, but submit that there is a very good case for granting the other alternative of the prayer of the petition. The child when with her father, is living in a house where there is no society except that of a female servant of all work ; but when she is with her mother, she has the attention of a mother whose conduct is entirely unexceptionable, and who has always endeavored to impress upon her child a proper regard towards the father ; and, in one letter from the father, he thus expresses himself : " I should be most happy to see my child put under her mother's protection." In another : " The charge of my seeking to deprive the mother of

(a) *Ex relations.*

[1] The father has the prior title to the custody of his infant children, unless he has forfeited his right by misconduct, or is unable to support them. *The People v. Chagery*, 18 Wend. 637. *The People v. —*, 19 Wend. 16. The supreme court of New York is authorized by statute, (3 R. S. 82, § 1, 2,) to award the custody of infant children to the mother, who is living in a state of separation from the father without being divorced. In a suit by a married woman for a divorce or separation from her husband, the court of chancery may make an order for the custody, care and education of the children. 2 R. S. 82.

1837.—*Ball v. Ball*.

her child is most false; if it had been true, my character would be stamped with that of a villain." Subsequently to these letters he secretes the child from her mother. The affidavits go on to state that the father's conduct was so gross and violent towards the mother, when she went to him to make inquiries after the daughter's residence, that it was dangerous for her to be in his presence. The question really is, whether a child of fourteen years old is to be deprived, by the brutal conduct of the father, of the company, advice and protection of a mother, against whom no imputation can be raised?

The VICE-CHANCELLOR :—Some conduct, on the part of the father, with reference to the management and education of the child, must be shown, to warrant an interference with his legal right; and I am bound to say that, in this case, there does not appear to me to be sufficient to deprive the \*father of his common law right to the care and custody of his child. [\*37] It resolves itself into a case for authorities; and I must consider what has been looked upon as the law on this point. I do not know that I have any authority to interfere. I do not know of any one case similar to this, which would authorize my making the order sought, in either alternative. If any could be found, I would most gladly adopt it; for, in a moral point of view, I know of no act more harsh or cruel, than depriving the mother of proper intercourse with her child.

I was myself counsel in two cases in which Lord Eldon refused petitions precisely similar. *Smith v. Smith*, one of them, was precisely similar, in its facts, to the present case, except that the father's object there was to compel the mother, by such means as those now complained of, to give up to him some property which was settled to her separate use. My course of argument in that case was that, as the law allowed the mothers of bastards to retain possession of their children till the age of seven, *a fortiori* must the law allow the care of legitimate children to be vested in the mother. The child in that case was under seven: the Lord Chancellor, however, refused the order; and, before any further proceedings were had, either the mother's or the child's death determined the question. That was a very strong case; yet the Lord Chancellor held that the court had no jurisdiction. The other case was *Gallini v. Gallini*. There the petition was on the ground of the father's religious principles: he was a catholic; but the Lord Chancellor refused, for such a reason, to take the children away from the father.

We then pressed that access might be allowed to the \*mother; but the [\*38] chancellor, I am nearly certain, refused the order.

Petition dismissed.(b)

Mr. *Pepys* and Mr. *Knight* appeared for the defendant, the father of the child.[1]

(b) See *Wellesley v. Duke of Beaufort*, 3 Russ. 1.

[1] Where the parents were living separate, the chancellor would not interfere to take a child of very tender age, and incapable of exercising any volition on the subject, from the mother, whose conduct and character were unimpeachable, to transfer it to the custody of the father. *The People v. Mercein*, 8 Paige, 47. See further, *In the matter of Woolstonecraft*, 4 Johns. Ch. Rep. 88.

1827.—*Peart v. Bushell.***PEART V. BUSHELL.(a)**1827; 6th August.—*Jurisdiction.—Solicitor.*

The court will not exercise its summary jurisdiction to compel a vendor's solicitor to perform an undertaking, given by him at the sale, to do certain acts for clearing the title to the estate.

THIS was a petition by a purchaser, who had paid the purchase money for an estate, to compel the vendor's solicitor to perform an undertaking, which he had given at the sale, to cause satisfaction to be entered up, at the vendor's expense, upon any judgments that might be found against one of the parties through whom the vendor's title was derived; to procure evidence of the deaths of certain other persons, and a covenant for the production of certain deeds, unless the originals were delivered up to the purchaser.

Mr. *G. Richards*, in support of the petition, said that the object of the petition was that the court might, by its summary jurisdiction over the solicitor, compel the performance of the undertaking. He admitted that he had not been able to find any instance of similar interference by courts of equity; but said that, at law, the jurisdiction of the courts over attorneys was often exercised in such cases.

[\*39] \*Mr. *Wray*, contra, was stopped by the court.

THE VICE-CHANCELLOR:—If any order is made, it must be for the performance of every one of the items in the undertaking. The nature of some of them is such that they may be impossible of performance; and then am I to throw the solicitor into prison until he has performed them, when it may turn out that they cannot be performed? The solicitor has undertaken to produce evidence of the deaths of two persons. To perform this may be impossible. How then am I to act?

I think also that this is not such a matter as comes within my jurisdiction. It is not, strictly, an undertaking in a cause; so that it is not a proper case for the court to act on with its extraordinary authority.

The only remedy for the petitioner is, when his possession is interfered with on account of anything arising upon the matters in the undertaking, to bring his action for damages.

I am very unwilling to make a precedent where none can be found.

Petition dismissed.

[\*40]

**\*PECK V. BEECHEY.**1827; 6th August.—*Jurisdiction.*

The court has no authority to advance part of the fund in the cause to enable indigent parties to prosecute their claims to it.

THE plaintiffs claimed to be entitled, as the next of kin of the late Mr. *Nollekens*, to the fund in this cause. To make out their claim, it was requi-

(a) *Ex relations.*

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 1827.—Hall v. Jones.
 

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site for them to have a commission to examine witnesses abroad ; and, being in indigent circumstances, they had obtained an order for part of the fund to be advanced to them, on the security of their solicitor, to defray the expenses of the commission. The commission having been returned, the master reported that the plaintiffs had not established their claim ; they nevertheless presented a petition praying that they might be allowed the expenses of the commission.

Mr. *Pepys*, for the petitioners, said that in *Cockerel v. Barber*, Lord Eldon, C. had granted a precisely similar petition.[1]

The VICE-CHANCELLOR :—Lord Eldon has expressed himself dissatisfied with his order in that case, and has said, from the bench, that he did wrong in granting the prayer of the petition.

Petition dismissed with costs.[2]

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 \*HALL v. JONES.

[\*41]

1827 ; 8th August.—*Guardian*.—*Infant*.

ONE of three persons who had been jointly appointed guardians of an infant, having died, the Vice-Chancellor, without a reference to the master, appointed the two survivors guardians of the infant.[3]

Mr. *Wilbraham* appeared in support of the petition.

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#### MEMORANDUM.

ON the 29th of October, 1827, Sir Anthony Hart resigned the office of Vice-Chancellor of England, and was succeeded by Launcelot Shadwell, esquire, who shortly afterwards received the honor of knighthood, and was sworn in a member of his majesty's most honorable privy council.

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#### KINGHAM v. MAISEY.

1827 ; 3d November.—*Practice*.—*Injunction*.

Motion by a plaintiff for an injunction to restrain an action brought by one defendant against a co-defendant, granted.

THE bill stated that, in January, 1822, James Saunders agreed, in writing, to sell a cottage and garden to Bernard Saunders : that Bernard Saunders paid

[1] It was refused by Lord Cottenham in *Nye v. Maule*, 4 Myl. & Cr. 342 ; and by Lord Langdale in *Johnston v. Todd*, 3 Beav. 218 ; and granted by Sir John Leach M. R. (on giving security however) in *Gregg v. Taylor*, 4 Russ. 279.

[2] Vide 1 Hoff. Ch. Pr. 72. In New-York, in suits for a divorce, or separation the court of chancery may, in its discretion, require the husband to pay any sums necessary to enable the wife to carry on the suit during its pendency. 2 R. S. 81, § 56.

[3] Vide *Peyton v. Bond*, 1 Sim. 392.

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 1827.—*Kingham v. Maisey*.
 

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the purchase money, and was let into possession: that, in May, 1823, [\*42] Bernard Saunders agreed, in writing, to \*sell the premises to the plaintiff, in part satisfaction of a debt; but that, in consequence of the small value of the premises, no conveyance had been executed: that Bernard Saunders remained in possession as tenant to the plaintiff: that the defendant, Maisey, having notice of these agreements, had prevailed on James Saunders to execute to him a conveyance of the premises, and had commenced an ejectment against Bernard Saunders, to recover possession thereof: that Bernard Saunders appeared and pleaded to the action, and entered into the usual rule to confess lease, entry, and ouster: that, at the trial of the action, at the last summer assizes, the plaintiff was nonsuited, in consequence of Bernard Saunders not appearing to confess lease, entry and ouster: that in consequence thereof Maisey would be entitled to judgment and execution in the action on the first day of the ensuing term. The bill prayed for a specific performance of the agreements: that James Saunders and Bernard Saunders might join in conveying the premises to the plaintiff: that the conveyance to Maisey might be set aside for fraud; and that he might be restrained from proceeding in the ejectment, or commencing any other proceedings at law against Bernard Saunders, to recover possession of the premises.

Mr. *Wakefield*, for the plaintiff, now moved for an injunction as prayed by the bill, which was granted by the Vice-Chancellor.

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[\*43]

## \*GARTHWAITE V. ROBINSON.

1827; 7th and 26th November.—*Will.—Construction.—Power.*

Power to appoint, amongst testator's present or future grand-children or their respective issue, does not authorize the donee to exclude the children of a deceased grand-child, who were living at the donee's death.

WILLIAM HANCOCK, esquire, made his will, dated the 20th of March, 1796, and, after making several pecuniary bequests, gave and bequeathed, except as before excepted, to Sir Francis Buller and William Hussey, all his effects and substance, of whatsoever kind and wheresoever, in trust to carry into execution the whole intents and purposes of his will. and of any codicil that might thereafter attend it. The testator then proceeded in the words following: "Now, if any surplus should remain after all the preceding articles are complied with, then it is my will and desire that the produce and profits of that surplus be applied and given to my daughter, Maria Robinson, for her to enjoy the benefit thereof during her life; and, after her decease, to dispose of the same, in such manner as she thinks fit, amongst all or one or more of her children, if she should have any; and, if she hath none, then amongst my present or future grand-children, or their respective issue, as she likes best. I do not mean to direct that such grand-children should have share and share alike, but to be con-

1827.—*Garthwaite v. Robinson.*

formable to merit, or to want not brought on by vice, folly or dissipation, of which the distributor or distributors for the time being are to be the sole judges."

The testator made a codicil to his will, which was partly as follows: "If my daughter, Maria Robinson, shall die in my life-time, leaving no issue, then I will and direct that my executors and trustees, or the \*survivor [\*44] of them, or their successors, shall dispose of all the residue of my estate and effects whatsoever, for the use of any one or more of my present or future grand-children, and under such terms and limitations over as they in their discretion shall think fit."

The testator died, leaving Mrs. Robinson and Elizabeth Douce, the wife of William Molyneux Marston, and Fanny, the wife of John Douce Garthwaite, his only children: and also leaving John Douce Garthwaite and Elizabeth Douce, the wife of John Allnutt, Fanny Trelawney Jennings, then Fanny Trelawney Garthwaite, Sophia Le Souef, then Sophia Garthwaite, Edward Hancock Garthwaite and George Garthwaite, the children of J. D. Garthwaite and Fanny his wife, his only grand-children; Mrs. Marston as well as Mrs. Robinson having no children. Elizabeth Douce Allnutt died in the life-time of Mrs. Robinson, leaving John Allnutt the younger and Anna Allnutt, her only children, her surviving.

Mrs. Robinson, by her will, dated the 12th of November, 1814, after reciting her father's will and codicil, and that, since she had no children of her own, and was not likely to have any, she was desirous of executing the power, reserved to her by her father's will, of appointing his residuary estate and effects amongst his grand-children or their respective issue; in exercise of that power, directed and appointed that one-fifth part of such residuary estate and effects should be paid and assigned unto her nephew, John Douce Garthwaite, one of the grand-sons of the said William Hancock, or to his assigns; and that one other fifth part thereof should be paid or \*assigned unto her nephew, [\*45] Edward Hancock Garthwaite, another of the grandsons of the said William Hancock, or to his assigns; and she gave the remaining three-fifths parts to trustees upon certain trusts for the benefit of George Garthwaite, Mrs. Jennings, and Mrs. Le Souef, for their lives, and, after their deaths, for their children respectively.

Mrs. Robinson died on the 13th March, 1827. The master, in pursuance of a reference made to him in the progress of the cause, reported that the testamentary appointment made by Mrs. Robinson, was a due execution of the power given to her by the testator's will over his residuary estate: in consequence of which, two petitions were presented, one, by the appointees, praying that the report might be confirmed, and the other, by John and Anna Allnutt, praying the reverse.

Upon the hearing of these petitions, one question was, whether, as Mrs. Robinson had not appointed any share of the testator's residuary estate to John and Anna Allnutt, the appointment made by her was not void.

Mr. Girdlestone, junr. and Mr. Purvis, in support of the appointment:—It  
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cannot be disputed that Mrs. Robinson would have had, under her father's will, an exclusive power of appointment to her children, if she had had any. The expressions, "as she thinks fit," and "as she thinks best," apply as well to the grand-children, as to the children. The testator also says, "amongst my present or future grand-children, or their respective issue." He could not have used words better adapted for giving the most unlimited power of selection, not only any class, but any individual of a class. The concluding sentence of the will brings this case within *Bevil v. Rich*.<sup>(a)</sup> There is some apparent ambiguity created by the word "distributors;" but it is removed by the codicil, which was made the day after the will; and, on looking at that instrument, it is clear that the testator, when using that word, had in view the execution of the power by his executors: and, if any doubt remains upon the question now under discussion, it is removed by the codicil; for it is quite clear that the executors were to have a power of selection, and the power given to them relates to the same fund and to the same objects as the power given by the will does; and it cannot be supposed that the testator intended his executors to have a more extensive power than his daughter had.

Mr. Sugden and Mr. Teed for John and Anna Allnutt:—The counsel in support of the appointment have not read the first sentence of the testator's will, according to its grammatical construction. The words, "as she thinks fit," do not govern the latter clause of that sentence. With respect to the children, the testator has given an exclusive power, in technical and proper language. If he had had the same intention as to the grand-children, he would not have varied the language. Then he concludes his will by saying, in effect, that, though he did not intend his daughter to exclude any of his grand-children, but that she should give something to every one of them, he did not mean them to [\*47] take share and share alike, but left it to her to be the sole judge of the share that each was to have. This clause would have been unnecessary, if he had given Mrs. Robinson the power of excluding any of the objects described in his will. If that be so, the question arises, what are the classes amongst which she is to appoint? Now it is impossible not to read the first "or" as "and," but the second must be taken disjunctively. We contend, therefore, that, under the true construction of this will, Mrs. Robinson was bound to give every one of the grand-children a share, and that the words, "or their issue," are substitutionary; that is, that if any of the grand-children were dead, their children were to come into their place. *Bevil v. Rich* has always been considered as a case by itself; and it wants the strong technical word "amongst."

The codicil does not explain the will, but gives a power different from that conferred by the will. The codicil gives a power to appoint to grand-children only, and not to their issue.

Mr. Girdlestone, jun. in reply:—The words of the testator's will ought to be taken in their usual sense. But if the first "or" is to be construed

(a) 1 Cha. Ca. 309.

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1827.—Watkins v. Stone.

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“and,” the second must have the same meaning put upon it; and then the will will authorize the appointment that has been made. The expression “as she likes best,” is tantamount to “as she thinks fit,” and brings this case within those where such expressions as “to be at her disposal,” &c. have occurred, and which have been held to authorize exclusive appointments. The will and codicil were both written by the testator himself, and therefore ought not to be \*looked at as if they [\*48] had been prepared by his legal adviser.

The VICE-CHANCELLOR :—The question is, whether the words of this power authorize an exclusive appointment to the testator’s grand-children? That question turns upon the grammatical construction of the sentence in the will, in which the power is given. I agree that it is impossible to carry on, to the latter part of the sentence, those words in the former part, which as has been admitted, give a power of selection as to the children. The word “amongst,” too, implies that each of the objects of the power should have a share.

The next question is, who are the persons amongst whom the appointment, is to be made? Now it appears to me that what the testator meant was, that Mrs. Robinson should dispose of his residuary estate amongst such of his present and future grand-children as should be living at her death, and the issue of such of them as should be then dead: and, as Elizabeth Douce Allnutt died in the life-time of the donee of the power, leaving children, and this lady, in executing the power, has not included those children, I am of opinion that the master’s report is wrong. Therefore dismiss the petition that prays that the report may be confirmed; and declare that Mrs. Robinson has not made any valid appointment of the testator’s residuary estate.

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\*WATKINS v. STONE.

[\*49]

1827: 8th November.—*Pleading.—Disclaimer.*

To a bill praying a reconveyance of four estates the defendant put in a plea of a fine as to one, concluding with a disclaimer as to the others: the plea was overruled.

THE defendant, Stone, had put in a plea and answer to the bill, which was overruled upon argument; but the court gave him liberty to plead *de novo*: (a) whereupon he put in the following plea:—

“The plea of William Owen Stone, one of the defendants to the bill of complaint of Elizabeth Watkins and Virginia Watkins, complainants. This defendant, by protestation, &c. as to all the discovery and relief by the said bill sought from and prayed against this defendant, doth plead in bar thereto, and for plea saith that Philadelphia Watkins, in the said bill named, being seised in

(a) See 2 Sim. & Stu. 560.



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 1827.—Watkins v. Stone.
 

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tail of the hereditaments and premises in the said bill mentioned, and called The Pant, a fine *sur conuzance de droit come ceo*, &c. was, in or as of Trinity term, 1822, levied in due form of law before the justices of the court of common pleas at Westminster, between John Price, plaintiff, and the said Philadelphia Watkins, defendant, of the said hereditaments and premises called The Pant, by the description of three messuages, three gardens, &c., with the appurtenances, in Lanvetherine, and also one annual rent of 4*l.* 5*s.* 2*d.* issuing out of the tenements aforesaid : upon which fine, proclamations were duly made according to the form of the statute in that case made and provided, as in and by such fine, &c. And this defendant doth aver that the said hereditaments and premises called The Pant, of which such fine was levied as aforesaid, are the only part of the hereditaments and premises claimed by the said bill of complaint in which this defendant has or claims, or ever had or claimed any estate, right, title or interest ; and that Ann Constable, in the said bill named, was the daughter of the father of the said Philadelphia Watkins, by a different mother. And this defendant therefore pleads the matters aforesaid in bar to the whole of the said bill, and humbly demands," &c.

Mr. *Sugden* and Mr. *Turner*, in support of the plea :—It may be contended that the plea is irregular, as being a plea and disclaimer ; and that the defendant ought to have answered as to all the estates, except The Pant : but, if the defendant pleads title to The Pant, and avers that he has no right to any of the other estates, the averment makes the plea a good defence to the whole bill. The right to have an account of rents, flows from the right to the estate ; and, if the right to the estate is excluded, every accessory to it must cease.

Mr. *Pepys* and Mr. *Jacob*, in support of the bill :—The bill claims title to four properties : Gelly Vawr, Gelly Vach, The Pant, and The Pack-horse. The plea admits that the fine had reference to The Pant only ; and there is no allegation, in the plea, that applies to the three other properties. If the fine is good as to The Pant, it leaves the rest open, and allows us to redeem the rest of the property. Next, this defence is of a totally novel nature ; it is a disclaimer coupled with a plea. Now, a plea must be single ; but here are [\*51] two defences which are totally distinct from each other. They tender two issues. Suppose The Pant to be quite out of the question, and that the bill had alleged that, as to the other properties, the mortgages had vested in the defendant, could he have disclaimed ? The plea admits all that is not pleaded to ; therefore, we must take it as true that these estates were mortgaged to the defendant. A party charged cannot disclaim. An executor who is called upon to account for his testator's assets, cannot disclaim all title to the property. It is no answer to a bill praying for a conveyance of an estate, for the defendant, to disclaim all interests in the estate. The only case for a disclaimer, is where a person is made a party to a suit as claiming some interest in the property in dispute. We state that we have applied for an account of rents of the three other estates. Why has not this account been rendered to us ? The defendant does not deny our title to these estates, which were vested

1827.—Carter v. Draper.

in him. He is bound to discover in whom they are now vested. We are entitled also to the title deeds of these three properties, and to have a discovery from the defendant whether he has or has not got them. The plea admits that the defendant claims part of the 1500*l.* which we are to pay, and therefore he is a necessary party to the suit.

Mr. *Turner*, in reply :—This plea is an allegation, on the part of the defendant, that he has not, nor ever had any interest in the three other estates. If it be true that the defendant had no right to these estates, his possession would be under an adverse title, and it could not be competent to the claimants to make him a trustee for them. The plea amounts to an allegation that the \*plaintiffs have no title to The Pant, and that the defendant has none to [\*52] the other estates, and consequently it is a defence to the whole bill. What mischief will accrue to the plaintiffs from this form of plea? Suppose they reply to the plea, and prove that the defendant had a right to the three estates, they will be in the same situation as any other plaintiff who disproves a plea, and will be able to examine the defendant on interrogatories.

The VICE-CHANCELLOR :—This plea first states the fine, and then what is said to be a disclaimer. Now a plea may state any number of matters that make one defence: but here the defendant first pleads, and then avers something totally disconnected with the plea. I confess it appears to me that this plea cannot be supported, as it is a double plea.

Plea overruled.[1]

#### CARTER V. DRAPER.

1827; 13th November.—*Practice*.—*Cross-examination*.

A party who omits to cross examine a witness under a commission at the usual period, will be allowed to exhibit interrogatories for that purpose on a subsequent day.

On the 25th of October, one Butler had been examined, under a commission as a witness for the plaintiffs; and, when his examination was finished, was tendered to the defendants, in the usual manner, for cross examination. The defendants, however, did not offer any cross interrogatories, but sent an intimation to the commissioners that they intended to \*cross examine [\*53] the witness upon interrogatories to be thereafter administered, which was objected to by the solicitor for the plaintiffs. On the 3d of November the

[1] "It is the pleading of a double bar which constitutes duplicity in a plea. But a plea is not rendered double by the mere insertion of averments therein, which are necessary to exclude conclusions arising from allegations in the bill, intended to anticipate and defeat the bar which might be set up in the plea;" *Bogardus v. Trinity Church*, 4 Paige, 194. Nor is there any necessity for allowing double pleas, as the defendant may combine all matters of defence in his answer: and where the defendant had pleaded two distinct bars, he was put to his election by which plea he would abide; *Saltus v. Tobias*, 7 Johns Ch. Rep. 214.

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 1822.—*Johnson v. Chippindall and others.*


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defendants obtained an order for liberty to add interrogatories to those already exhibited by them for the examination of their own witnesses, and for the cross examination of the plaintiffs' witnesses.

Mr. *Spence*, for the plaintiffs, now moved to discharge the order, as to the adding of cross interrogatories, for irregularity.

The question is, whether a party may, as a matter of course, delay filing his cross interrogatories, until the witness has finished his examination in chief. One can see the principle of the distinction between allowing interrogatories to be added for examination in chief, and for cross examination; for, in the latter case, they are leading; and therefore it is more dangerous, in the former case, to let the time go by, than it is in the latter, as the party has thereby an opportunity of talking to the witness.

Mr. *Kindersley*, for the defendants:—In the examiner's office a party may at any time, exhibit either interrogatories in chief, or cross interrogatories. The mischief which may arise from exhibiting the additional interrogatories, is the same, whether the examination takes place before the examiner, or before the commissioners. The reason why an order is necessary in the latter case, is that the authority of the commissioners is limited, by their oath, to [\*54] the interrogatories originally left with them: but that is \*not the case with respect to the examiner. *Campbell v. Scougal*.(a)

Mr. *Spence*, in reply:—The passage cited from the judgment in *Campbell v. Scougal*, is too indefinite to enable the court to judge what was the opinion of the Lord Chancellor upon a subject which was not brought before him. The difference between the examiner and commissioners, is that the latter are appointed by the parties, and therefore the court looks more strictly at their conduct; but the former is an officer of the court, and is perfectly independent of both parties. No instance of an order similar to the one in question, has been or can be produced. If this order stands, no party will in future exhibit cross interrogatories, until his adversary's witnesses have all been examined.

The VICE-CHANCELLOR said that what fell from Lord Eldon, C. in the case that had been cited, seemed to support the practice as contended for by Mr. *Kindersley*, and refused the motion.[1]

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 [\*55]

\*JOHNSON V. CHIPPINDALL and others.

1827; 14th and 15th November. 1828; 16th January.—*Sequestration—Chose in action.*

The court has no jurisdiction to order, upon motion, a person not a party to the cause, to pay into court the arrears of an annuity granted by him to a defendant against whom a sequestration has issued for want of a sufficient answer, unless the grantor has, by his conduct, waived the objection to the jurisdiction. But he may, notwithstanding, and without applying for the leave of the court, obtain, from the grantee, a release of the annuity.

(a) 19 Ves. 552. See 554 and 555.

[1] Vide *Keogh v. Pentland* 2 Hog. 221.

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 1827.—Johnson v. Chippindall and others.
 

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On the 3d of May, 1824, the bill in this cause was filed, against the defendant William Chippindall, and two other persons, for the usual accounts of certain real and personal estates. In May, 1825, Chippindall, after having put in two insufficient answers, absconded. On the 5th of that month, an order was made, in the cause, for the serjeant-at-arms to apprehend him. To this order the serjeant-at-arms returned *non est inventus*: whereupon, on the 21st of the same month a writ of sequestration was issued against Chippindall's estate and effects. The sequestrators were not able to discover any property of Chippindall's, except an annuity of 250*l.* secured to be paid, quarterly, by the bond of Rowland Yallop (who was not a party to the cause) dated the 16th of March, 1825, the first payment of which became due on the 1st of April in that year; and which annuity was, under a proviso in the condition of the bond, subject to be redeemed, by Yallop, on certain terms therein specified. On the 30th of September, 1825, the sequestrators served Yallop with notice of the sequestration, and required him not to pay the annuity to Chippindall, or any other person on his behalf. On the 20th of February, 1826, the plaintiffs, on an affidavit stating the previous matters, and also that Chippindall was indebted to them in 10,000*l.* and upwards, moved for an injunction to restrain Chippindall from proceeding in an action which he had commenced against Yallop for the arrears of the annuity; and also to restrain Chippindall from receiving, and Yallop from paying to him the arrears and future payments \*of the annuity; [\*56] and, on hearing counsel for Mr. Yallop, an injunction was ordered accordingly.[1] On the 14th of March, 1826, the plaintiffs obtained an order that Yallop (who appeared by counsel on this occasion also) should pay the arrears and future payments of the annuity into court. Yallop, in obedience to this order, paid 178*l.* 5*s.* 6*d.* into court. An arrangement was afterwards made, between Yallop and Chippindall, by which it was agreed that the latter should release the annuity, and all the arrears thereof, on receiving 990*l.* from the former; and, on the 30th of June, 1827, a deed of release was executed accordingly. On the 23d of July, 1827, the plaintiffs served Yallop with a notice of motion for him to pay into court, in obedience to the order of the 14th of March, 1826, 312*l.* 10*s.* the arrears of the annuity, or, in default thereof, that he might stand committed to the custody of the serjeant-at-arms. Yallop, upon receiving this notice, served the plaintiffs with a notice of motion to discharge the order of the 14th of March, 1826; and, on the 3d of August, 1827, made an affidavit, in support of his motion, in which he deposed that, in 1820, the defendant William Chippindall admitted him into partnership, in the business of an attorney, upon payment of a premium of 2000*l.*: that, in January, 1822, Chippindall, in compliance with the terms of the partnership, retired from business, upon an annuity of 500*l.* to be paid by Yallop: that, in 1824, Chippindall, in consequence of the profits of the business being much less than he had represented them to be when the partnership was formed, consented to reduce

[1] Vide *Kingham v. Maisey*, ante, 41.

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1827.—*Johnson v. Chippindall and others.*

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the annuity to 250*l.*, upon which the bond before mentioned was executed : that Chippindall, notwithstanding his retirement had agreed to assist [\*57] Yallop in the business, and \*to recommend clients to him : that Yallop had been deprived of these benefits by Chippindall's absconding : that the business had, in consequence, become much less profitable than it was when the bond was executed ; and that Yallop was 2000*l.* out of pocket besides the premium : that he had frequently complained to Chippindall's agent of the hardship of paying the annuity, and threatened to get relieved from it, on the ground of misrepresentation as to the profits of the business : that, after much discussion, the agent agreed that the annuity should be released on the payment of 990*l.*, being four years' purchase, which was a fair price, as Chippindall was then in his sixty-sixth year : that the release was accordingly executed by Chippindall, and the bond given up and cancelled : that Yallop, when the order of the 14th of March, 1826, was obtained, had no idea that it would have prejudiced any right that existed as between himself and Chippindall in relation to the annuity, or that he should have been precluded from obtaining a redemption of it, if it was his interest so to do.

The following letters were written by Chippindall to the plaintiffs' solicitors :

" Gentlemen,

*Calais, 29th Nov. 1826.*

" As Mr. Yallop has never paid me but one half-years annuity secured by his bond, and I know you can easily compel him to pay the arrears into court, and more particularly as I am nearly without money ; if you would have the kindness (at my expense) to move that he may pay all the arrears into court, it would render me most essential service."

" Gentlemen,

*Calais, 31st May, 1827.*

[\*58] " I understand from my son William, that the terms \*you now propose and mean to abide by, are to the same effect as those originally proposed, with this difference, that I am to give up to your clients half the arrears of the annuity, and also 50*l.* per annum out of the future payments. Perhaps I might consent to this on your clients paying Stutely's demand, provided this arrangement is immediately carried into effect.

" I take this opportunity of expressing my astonishment that you have allowed the arrears of the annuity, to the amount of 312*l.* 10*s.*, to remain in the hands of Mr. Yallop. I cannot conceive what right you have to destroy me and my family, to make them the victims of your notions of delicacy, for that it seems is the reason you assign for not proceeding against him, he being a professional man ; neither can I see how you can reconcile it to yourself to sacrifice the interests of your clients to the same false sense of delicacy ; for I much fear that you will now find that this neglect on your part to enforce the payment of the arrears for the last twelve months, will be the great obstacle to the speedy arrangement of this business, as I will not settle until all the arrears are in court."

The following letters were written by Yallop to the solicitors of the plaintiffs, in the course of the proceedings before detailed :

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"I shall be obliged if you will let this motion stand until the 4th seal (the 14th,) when I will move to pay the money into court, on or before the first day of term. Yours, &c.(a)

"I shall feel particularly obliged if you will not for the present press the payment of Chippindall's annuity; \*there is but one quarter due; [\*59] according to the terms of the order, another will be due on the 1st of July, when I shall be in a better situation than at present to meet this unreasonable demand. I am, &c.

"5th May, 1827."

"Enclosed I send you an affidavit, respecting the payment of 200*l.* for your perusal, and, if you approve of it, I will immediately swear to it, and, within a week from this day I will pay the balance into the bank; and, if I do not, you shall be entitled to your order. Under these circumstances I trust you will not press your motion, a proceeding which I cannot help feeling, as against me, extremely harsh; as I am satisfied, if I had, at the period when the order was made, or even now, were to oppose the payment, your injunction would not stand for a moment.

"3d June, 1827."

Yallop wrote two other letters also to the plaintiffs' solicitors, one dated the 27th of June and the other the 10th of July, 1827, in which he requested them to return an affidavit he had sent them for their approval, in order that he might have it sworn, and the balance paid into court.

Mr. Sugden and Mr. Cooper for Mr. Yallop:—As Mr. Yallop was not one of the parties to the cause, the orders that have been made in it could not prevent his obtaining a release of the annuity. As the subject has ceased to exist, the operation of the orders must cease also. But, supposing this annuity to be still existing, then two questions arise: 1st, whether a chose in action can be taken under a sequestration; and 2d, if it can, whether the person who is liable to the demand \*must not be a party to the suit. The earliest [\*60] case upon this subject is *Lakes v. Meares*,(b) which was decided five years before the date of Lord Bacon's orders;(c) and, as is observed in *Fenton v. Lowther*,(d) it does not appear that the order was not made on a bill filed. All the early cases upon this subject are referred to in the argument in *Simmons v. Lord Kinnaird*.(e) The later cases are *Dundas v. Dutens*,(f) *M'Carthy v. Goold*,(g) in which it was considered that the debtor must be a party to the suit. The only case in which he was not a party, is *Pelham v. The Duchess of Newcastle*,(h) but there the order was not opposed. In *Francklyn v. Colhoun*,(i) the opinion of the Lord Chancellor was against the motion, and no order was made upon it, as appears on searching the registrar's book; but the order for payment of the money into court, was made in the interpleading

(a) There was no date to this letter.

(c) See Ord. Ch. Ed. Beames, 16.

(f) 1 Ves. J. 195. (g) 1 Ball. & Beatt. 387.

(b) Toth. Transact. 175.

(d) 1 Cox. 315.

(h) 3 Swanst. 290, note.

(e) 4 Ves. 735.

(i) Ibid. 276.

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suit,(i) although the report states differently; and the two other causes were finally compromised. *Hide v. Petit*,(j) and *Fenton v. Lowther* are strong authorities in our favor. It will, perhaps, be said that a sequestration is analogous to an outlawry. But debts could not be taken in execution under an outlawry,(k) and all the subsequent proceedings are in the exchequer, and the king directs payment of the debt *ex gratia* only. In *Morrice v. Governor & Company of the Bank of England*,(l) Lord Talbot, C. treats a sequestration as a more extensive *feri facias*.

Mr. Horne, Mr. Wakefield and Mr. Lynch, for the plaintiffs:—The case of *Hide v. Petit*, as reported in 1 Ch. Ca. 91, differs from the report in Freeman, and is in our favor; and so is *Francklyn v. Colhoun*. On reading the judgment in that case, it appears that the Lord Chancellor was clearly of opinion that choses in action were the subjects of sequestration, and that the only doubt was how they were to be made available; whether by suit, or by order without suit: for the Lord Chancellor says, "The true question is," &c.(m). Yallop was a party to the order for the injunction. That order has not been appealed from, and we are now acting upon it. Yallop, in the correspondence which took place between him and the solicitors of the plaintiffs, not only offers to pay the money into court, but to make the motion himself. Is it consistent with good faith that this gentleman, after having made these offers, and acquiesced, in the orders that have been made, down to the present time, should oppose our motion, and object to the jurisdiction? He has waived all questions as to the jurisdiction, and has submitted to pay the money upon motion.

It can be shown, by a series of authorities, that choses in action have been rendered available to sequestration, and it is only where there is an account to be taken, that a bill must be filed. That is the distinction \*between *Simmonds v. Lord Kinnaird* and the present case. There are two cases to that effect in Tothill, *Lakes v. Meares*,(n) and *Roane v. Stepney*.(o) If a party against whom a sequestration issues, is in possession, the sequestrator takes possession; but, if the property is in the hands of a third person, the sequestrator must be aided by an order of the court. Thus tenants of a sequestrated estate are ordered to attorn to the sequestrator. *Hide v. Petit*,(p) *Marquis Caermarthen v. Hawson*,(q) *Lord Pelham v. Duchess of Newcastle*,(r) *Opie v. Maxwell*,(s) *Barrington v. Hereford*,(t) *Fenton v. Lowther*,(u) *M'Carthy v. Goold*,(x) *Francklyn v. Colhoun*,(y) *Rowley v. Ridley*.(z)

The release of the annuity is a mere collusive proceeding between Chippin-

(i) The order here alluded to, was not passed and entered; but, in the registrar's minute book, it is intitled in all the three causes.

(j) 2 Freem. 125. See Jacob's Rep. 52.

(d) Ibid. 301. (h) Ca. Temp. 217, 222.

(n) Ubi supra. (e) Trans. 176.

(r) Ibid. 290. (s) Cited 4 Ves. 742, 744.

(z) Ubi supra. (y) Ubi supra.

(k) 2 Roll's Ab. 806; 1 Tidd's Pract. 156, 7th ed.

(m) See 3 Swanst. 309.

(p) Ubi supra.

(q) 3 Swanst. 204

(t) Ibid. 743.

(u) Ubi supra.

(z) Cited 4 Ves. 746, and see 3 Swanst. 306.

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dall and Yallop, and is a mere nullity. *Witham v. Bland*,<sup>(a)</sup> *Coulston v. Gardiner*,<sup>(b)</sup> *Bird v. Littlehales*,<sup>(c)</sup> *Hamblyn v. Ley*;<sup>(d)</sup> and Mr. Yallop does not venture to swear that he has paid the consideration money for the release.

Mr. *Sugden*, in reply:—No dictum has been produced that a chose in action is properly the subject of a sequestration. In *Pelham v. Duchess of Newcastle*, the banker was willing to get rid of the money, and the objection was not taken. \*It was admitted that he might have filed a bill of interpleader. [\*63] The case of *Hide v. Petit*, as reported in 1 Ch. Ca., turns upon the validity of the award; and it is stated, *totidem verbis*, that the matter did not come in question. All the cases cited, in *Simmonds v. Lord Kinnaird*, in favor of a chose in action being taken under a sequestration, are answered by the opposite counsel.

The object of a sequestration is to drive the defendant to put in an answer speedily. Can any thing be so absurd as to hold that his debts may be taken? Can a sequestrator bring an action for them? No; a bill must be filed. Supposing the claim is a litigated one, how will the object then be answered? The intention of the process was to put the strong arm of the court upon what was tangible, and could be taken at once.

The court cannot decide against Mr. Yallop, without overruling *Fenton v. Lowther*. In *Simmonds v. Lord Kinnaird*, the Lord Chancellor says: "I wish the process could go to the extent you desire." It is clear, therefore, that he was of opinion that he had no jurisdiction in that case.

At all events, if choses in action are the subjects of a sequestration, a bill must be filed, and there is no authority that they can be made available upon motion. *Fenton v. Lowther*, and *Simmonds v. Lord Kinnaird*. If, in the latter case, a motion would have been sufficient, the bill would have been demurrable upon that ground.

\*As to the argument founded on Mr. Yallop having acquiesced in the [\*64] orders, he was ignorant, until he was informed by his counsel, that the court had no jurisdiction to make those orders. His letters are nothing more than an admission that the order was binding upon him whilst it remained in force. He does not ask that the money which he has paid into court may be repaid to him.

The Vice-Chancellor, after stating the nature of the suit and the proceedings in it, and noticing that no notice of motion had been given to discharge the order of the 20th of February, 1826, proceeded as follows:—

When the motions were argued before me, it was stated that a similar question had been discussed in *Mallard v. Mallard*;<sup>(e)</sup> but it appeared to me that there was a material distinction between the two cases. Because in *Mallard v. Mallard* there was, on the first application, a resistance made;

(a) 3 Swanst. 276, 277.

(d) Ibid. 301

(b) Ibid. 279.

(c) Ibid. 299.

(e) Before Sir A. Hart, V. C. but not decided.



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but, in this case, it appears, by the letters, that there has been an acquiescence in the jurisdiction, on the part of Mr. Yallop, which has continued for a length of time; and therefore I ought not now to permit him to withdraw from the jurisdiction.

I find no instance in which the court has compelled a third party to pay in a chose in action, without a bill, where any resistance has been made by the holder of the chose in action. The old cases are collected in the notes to *Francklyn v. Colhoun*; but in none of them [\*65] does it appear that any resistance was made. In *\*Pelham v. Duchess of Newcastle*, Child, the banker, probably consented to the order. The old cases, therefore, leave it in doubt whether the court has jurisdiction to make the order upon motion. But, if it had been a clear point, one would not have found such a bill filed, as in the case of *Simmons v. Lord Kinnaird*; for that was filed to give effect to the sequestration; and, if it had been competent to the court to make the order upon motion, one can hardly think that such a bill would have been filed. The Lord Chancellor too expressed it as his opinion, that such a bill could not be supported on the general ground. (His Honor here read the judgment in *Simmonds v. Lord Kinnaird*.) It cannot, however, be said that the cases that have been quoted, prove that there is any settled jurisdiction in this court to compel payment of the chose in action, upon mesne process. In *Wharam v. Broughton*,<sup>(f)</sup> Lord Hardwicke, C., says: "For the writ of sequestration does not require the sequestrators to levy to the use of the plaintiff; but only to detain and keep in their hands till the sum is fully paid, the contempts cleared, and the court make further order to the contrary. It is not of a great many years standing that the court has ordered goods to be sold to satisfy payment after a decree; but it is very lately that the court has ordered it for a collateral contempt in proceeding before a decree, which the court now does in aid of its proceedings." So that Lord Hardwicke shows that he considered, the application of sequestration to mesne process, as a modern thing, and that the sequestrators were only to keep what they had seized, [\*66] in their hands, until the contempt was cleared. The difficulty, "therefore, is, what are the sequestrators to do with the chose in action when the contempt is cleared. Are they to hand it over to the creditor, or to return it to the debtor? There is the form of the order of sequestration in *Pope v. Ward*.<sup>(g)</sup> There the words "personal estate" are used: but those words do not carry the matter further than "goods and chattels," and are mere amplification. In *Angel v. Smith*,<sup>(h)</sup> what Lord Eldon, C., says respecting this writ, applies to land. Then we come to *Francklyn v. Colhoun*, where the Lord Chancellor, speaking of this process, uses this expression: "But a chose in action cannot be so taken:" and in the absence of authority

(f) 1 Ves. 184.

(g) 1 Cox. 194.

(h) 9 Ves. 335.

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more cogent than I have referred to, this is sufficient to govern me. I observe that in *Simmonds v. Lord Kinnaird*, the solicitor general says that sequestrators claim for past rents. But there is no possession of land, except by taking the rents as they had or did become due, unless the effect of the process were to turn the tenants out of possession; therefore that is not an authority that a sequestrator can lay hold of a chose in action. And, as there is no process at common law, except an extent, to take debts, I should not say that I could, upon mere motion, compel this party to pay in the chose in action; therefore I disclaim that authority.[1]

But, in this case there is matter which enables me to decide this point without reference to the authorities. For, in the first place, the motion of Mr. Yallop admits that the order of the 20th of February, 1826, is in full force: and it is not consistent with that order for Mr. Yallop to say that he ought not to be compelled \*to pay in the arrears of the annuity. Besides, [\*67] it appears that a considerable correspondence arose out of the proceedings on this sequestration. On the 29th of November, 1826, Chippindall wrote to the plaintiffs' solicitors. (His Honor here read the passage in that letter, which is before inserted.) Mr. Yallop, in his first letter,(i) which was written after the order of February, 1826, but before that of March, 1826, says, (here his Honor read that and the next letter.) By the expression "unreasonable demand," Yallop means that he considered the annuity exorbitant, having regard to what preceded and followed the grant. (His Honor here read Mr. Chippindall's letter of the 31st of May, 1827, and then proceeded.) So that it is clear that Chippindall and Yallop both considered that, as between themselves and the plaintiffs' solicitors, there was a right in the plaintiffs' solicitors to have what was due. This correspondence went on for several months. But if Mr. Yallop had made resistance to the proceedings at first, the plaintiffs' solicitors might have acted in a different manner from what they have done. Inasmuch, therefore, as the motion is made under these circumstances, and does not seek to discharge the order of the 14th of February, 1826, I must make an order according to the terms of the notice of motion of July, and no order upon Mr. Yallop's motion.

(i) The letter without date.

[1] A person liable to the payment of a rent charge to a defendant against whom a sequestration had issued was willing to pay it upon being indemnified by the sequestrators, which not being granted, it was paid to the defendant under threat of distress; a motion was made to have the amount paid over again to the sequestrators which was refused; but sums afterwards to become due were directed to be paid to them. Lord Langdale, M. R. says; "I have read the cases cited in the arguments and many others; and it appears to me that in such a case as this, a chose in action is subject to the process of sequestration, but how the sequestration is to be made effective in respect of choses in action may be a question of much consideration; in a clear and simple case it may be by order only, or a voluntary payment may be protected; in other cases it may be necessary to resort to an action or suit, under the direction of the court. But I consider it to be clear, that if the party owing the debt requires protection, he ought to have it, and that even if he is willing to make payment, the court would not order it, unless it appeared that protection would be afforded." *Wilson v. Metcalfe*, 1 Beav. 263. And see *Hodgens v. Wheeler*, Saines & Sc. 443; a decision in favor of the liability of choses in action.

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The plaintiffs' motion granted, and Yallop's refused, but no costs given on either of them.

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[\*68] \*1828 ; 31st March.—On this day a motion was made, by Mr. Yallop, to discharge the orders of the 20th Feb. and 14th March, 1826. By an affidavit in support of this motion, he deposed that, some time in June, 1826, when the plaintiffs were pressing him for payment of the annuity, he consulted with counsel as to the legality of the said orders, and was advised that the court had not the power of making them, and that he was entitled to have them discharged ; and, being extremely desirous of getting rid of the payment of the annuity, which he had always considered oppressive and unjust, he consented to enter into a negotiation with the defendant William Chippindall, for the repurchase thereof, as he was advised he might safely do, and that, ultimately, the contract for the redemption of the annuity before mentioned, was executed by William Chippindall : that it was agreed between him, Yallop, and Robert John Chippindall, (who negotiated the purchase on behalf of Wm. Chippindall,) that bills of exchange should be given by him, Yallop, to William Chippindall, payable at different periods, for 900*l.* part of the sum agreed to be paid for the redemption of the annuity, and that such bills should not be handed over to William Chippindall, or be negotiated, but retained by R. J. Chippindall, in trust for Yallop and William Chippindall, until it should be decided, by the court, whether such purchase could be carried into effect or not : that R. J. Chippindall had lately quitted England, and gone to reside abroad, and, in violation of the trust reposed in him, had, as Yallop had been informed, delivered up the bills to William Chippindall, who was also residing abroad : that the bills had all been negotiated by Wm. Chippindall, and that two of them, amounting to 100*l.* and upwards, had been

[\*69] \*lately presented for payment, and, being in the hands of *bona fide* holders, Yallop had been compelled to pay them, and was then threatened with legal proceedings for the recovery of the amount of another of them, if the same were not immediately paid ; that, on the 3d of December 1827, he had received the following letter from William Chippindall :—

“ Dear Sir :—I have been waiting, now nearly a month, to hear from you on the subject of your motion, on which his Honor the Vice-Chancellor took time to consider his judgment, but not one line have I received from you, my only information arising from the report of the motion in The Courier newspaper. By the report in that paper, it appears that your counsel omitted to state that you had given bills for part of the consideration money, and that you had paid the residue, being 100*l.* : on the contrary, he stated that you had deposited bills to abide the event. Now, this is not the fact. You know that you have accepted bills to the amount of 900*l.* drawn by me and payable to my order, being the residue after deducting the 100*l.* paid me. These bills were negotiated, early in July last, by me, and are now in the hands of indorseees

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for valuable consideration ; and, let the decision be what it may, these bills must be paid.

*Calais, 30th Nov. 1827."*

That, from the period when this matter was previously discussed before the court, up to the date of the above letter, he had not, directly or indirectly, held any communication, by letter or otherwise, with William Chippindall, upon the subject of the annuity, or \*any matter connected therewith, or [\*70] with the proceedings of the plaintiffs ; and that he was not in any manner acting in collusion with William Chippindall, or any other person connected with or acting for him, in any attempt to obtain an improper release of the annuity, or to frustrate any claim or demand which the plaintiffs might then have or could have had upon him.

Mr. Sugden and Mr. Cooper, in support of the motion :—It is important to observe that this sequestration did not issue to compel obedience to a decree, but for want of an answer. *Maynard v. Pomfret*,<sup>(k)</sup> and the Solicitor General's argument in *Simmons v. Lord Kinnaird*.<sup>(l)</sup> Mr. Yallop, though he appeared upon, and did not oppose the motions on which the orders now sought to be discharged were obtained, did not consent to them, and, therefore, he is not precluded from moving to discharge those orders. It has been said that Yallop may repurchase the annuity, but must pay the purchase money into court. But what discharge can the court give him ? Chippindall may clear his contempt to-morrow ; what would then be done with the money ? What is there to preclude Yallop from filing a bill to set aside the annuity on the ground of the fraudulent misrepresentation made by Chippindall, and which induced Yallop to grant the annuity ?

The court did not seize the annuity, because it had jurisdiction over it, but because Yallop had acquiesced in the orders. As there is now an end of the \*annuity, there is an end of the jurisdiction, which was given by [\*71] the acquiescence ; and, as the court had, originally, no power to take the annuity, it cannot seize the money paid for the repurchase, because the court never could have laid its hands upon that money.

Mr. Horne, Mr. Wakefield and Mr. Lyuch, for the plaintiffs :—The bills of exchange were never intended to be circulated ; for Mr. Yallop complains that they were negotiated in breach of the understanding between him and Chippindall. The plaintiffs did not authorize Chippindall's son to be the depository of the bills, but he was chosen by Yallop for that purpose. When Yallop submitted to the orders, he submitted himself to the jurisdiction, and cannot now withdraw from it. *Coulston v. Gardiner*.<sup>(m)</sup> He did not apply to the court for leave to redeem the annuity : he ought to have asked for a reference to the master, to ascertain on what terms he might redeem it. The injunction granted to restrain Chippindall from suing Yallop for the annuity, was an effectual release to him.

(k) 3 Atk. 468.

(l) 4 Ves. 738, 739.

(m) 4 Swanst. 279, n.

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The VICE-CHANCELLOR :—When this matter was last before me, I did, whilst endeavoring to ascertain what was the law upon the general point, consider whether it would be competent to Mr. Yallop, who was the person bound [\*72] to pay the chose in action, to receive a release from the creditor \*of the chose in action : and, inasmuch as, had it not been for the accidental circumstance of Mr. Yallop placing himself within the jurisdiction of the court, the court would have had no jurisdiction whatever over the annuity, I thought that he could be considered as having subjected himself to the jurisdiction of the court, so far only as, by his own acts, or, if I may use the expression, by his own intromissions in the proceedings regarding this annuity, it might have happened that he had actually bound himself. It would, therefore, have been a violent thing to say, as the annuity was then existing, and as Mr. Yallop was compellable to pay it if legal process was issued by Mr. Chippindall, that he should be prevented from taking a release of it from Mr. Chippindall, if that gentleman, upon terms that satisfied himself, should think proper to give one ; for, as against Mr. Chippindall, the court had no jurisdiction whatever over the annuity, and it was only because Mr. Yallop had accidentally subjected himself to the jurisdiction, that the court possessed any authority at all over the annuity. Mr. Chippindall was perfectly free to release the annuity upon any terms. The question was, whether Mr. Yallop had, by his conduct, precluded himself from receiving the benefit of any act which Mr. Chippindall himself might, in his own discretion, do : and I was so fully satisfied, at that time, that Mr. Yallop was at liberty to take a release of the annuity from Mr. Chippindall, that I had prepared myself to express that opinion ; because, as I collected the facts from the affidavit made on the 3d of August, I supposed that the consideration for the release had been paid. But, having been informed afterwards [\*73] that the release was not perfect, I was \*induced to refrain from expressing the opinion which I had deliberately formed, and still entertain.

By the affidavit of the 3d of August it was stated, in a short manner, that the release had been given, but it was not said that the consideration had been paid. I cannot think that any fraud has been practised by Mr. Yallop in the transaction. He states the fact that the release had been executed ; and I think that, so far from there being any thing like an intention to practise a fraud on the court, Mr. Yallop's conduct has been quite correct, and that he has brought the facts of the case fairly before the court.

When the case was argued, it was supposed that, in point of fact, the consideration for the release of the annuity had not passed from Mr. Yallop to Mr. Chippindall ; therefore, any observations in respect of the release were properly abstained from. It appears, on the affidavit of Mr. Yallop last made (an affidavit which, I understand, is not in any manner opposed,) that, though he had made a compromise which reduced the original annuity from 500*l.* to 250*l.*, he had still reason to complain of the existence of the annuity of 250*l.* ; because that reduced annuity was secured, by his bond, upon the condition that Mr. Chippindall was to assist in carrying on the business. It appears, however,

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that, so far from Mr. Chippindall consenting to perform this part of the agreement which related to the reduced annuity of 250*l.*, he relieved himself from all attention to the business, and, in fact, went to France; and Mr. Yallop's affidavit states what is consistent with all the correspondence which appears on the papers before me. It appears that there was a \*good [\*74] deal of negotiation, at least I collect so from the affidavit; and that the bills of exchange were deposited with Mr. R. J. Chippindall, and were afterwards handed over by him to Mr. Wm. Chippindall; and no one who reads his letter can doubt that he has had as much benefit of the bills as if they had been originally placed in his hands. It is observable, although Mr. Yallop does not state the fact, that he paid the additional sum of 90*l.*; and it appears, by that letter of Mr. Chippindall's set forth in the affidavit, that the bills were negotiated by him, and that Mr. Yallop has actually paid some of them. So far from there being any thing like a fraud upon the plaintiffs, Mr. Yallop was endeavoring to extricate himself from a case of hardship in which he was placed by Mr. Chippindall; and he was only doing that which he was at perfect liberty to do. I think that, inasmuch as this was an act of Mr. Chippindall's which Mr. Chippindall was at liberty to do, and this was an acceptance of the act which Mr. Yallop was at liberty to give, the subject matter of the orders of the 20th February and the 14th March ceased to exist; and that these orders ought to be discharged.

With respect to the cases that were referred to, they apply to legitimate subjects of sequestration, over which this court originally had jurisdiction; but which, in this case, it never had, and could not have had, but for the accidental circumstance I before alluded to. I would maintain the principle of Lord Hardwicke as much as any one would; but that principle is not in the least applicable to the present subject. I wanted some information about the sum of 90*l.*, and I find it supplied by Mr. Chippindall's letter.

\*Making an order to discharge these orders will not, in fact, interfere [\*75] with the order of the 16th January, 1828.

Motion to discharge the orders of 20th February and 14th March, granted.

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#### HORLOCK V. PRIESTLEY and wife.

1827; 21st November.—*Priority of incumbrances.*

Where, by the custom of a manor, no time is limited for presenting surrenders of copyholds, an incumbrancer whose security has not been enrolled until long after a subsequent incumbrance, will not be postponed, although the subsequent incumbrancer had no notice of the prior charge.

In 1790, Thomas Bennett, being seised in fee of certain copyhold hereditaments, made a conditional surrender of them, out of court, to the defendant, Jane Priestley, then Jane Hulton, spinster, in fee, to secure the repayment of 1,000*l.* and interest. At a court held on the 10th of December, 1792, the

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homage presented this surrender to the steward for enrolment ; but it was not then enrolled. In 1800, Bennett died ; and, in 1808, his son and customary heir sold the property to Thomas Smith, who was duly admitted to it on the 12th of December, 1814. Smith covenanted to surrender the copyhold hereditaments to trustees, upon certain trusts for securing two annuities which he had sold to the plaintiff and one Yems, and, on the same day, surrendered the premises accordingly. At the next court, held on the 3d of May, 1815, this surrender was presented and enrolled ; and the trustees were admitted on the 28th of February, 1824. At a court held on the 19th of June, 1820, the surrender of the 10th of December, 1792, was again presented : and, on the 15th of May, 1823, the defendants, Priestley and wife, were admitted under [\*76] it. Horlock and Yems, before they paid their \*purchase moneys for the annuities, searched the court rolls for incumbrances, but found none. There was no definite time within which surrenders were required to be presented. The bill prayed, amongst other things, that the surrender made in 1790 might be postponed to that of the 12th of December, 1814, and that the defendants, Priestley and wife, might concur in the sale of the premises, under the trusts upon which that surrender was made. The defendants, in their answer, said that they did not disturb either the Bennetts or Smith in the possession or enjoyment of the premises, because the interest of their mortgage money was regularly paid up to August, 1818, and they supposed that the surrender had been duly enrolled according to the presentment in 1792.

This cause was heard in Hilary term, 1824, when the court directed an ejectment to be brought by the defendants, in order to ascertain whether the legal estate in the premises was vested in them or not. At the trial of the ejectment, a verdict was found for the plaintiff at law, subject to the opinion of the court of king's bench upon a case : and the court, after hearing the case argued, ordered the *postea* to be delivered to the plaintiff.(a)

Mr. *Heald*, Mr. *Halsewood* and Mr. *Pennington*, for Horlock and Yems :— All that the court of law has decided, is that Mr. and Mrs. Priestley have got the legal estate in them ; but the question is, whether this court will not [\*77] postpone their security in consequence of their \*negligence in not having their surrender entered on the court rolls, whereby they enabled Smith to commit a fraud on Horlock and Yems. Persons are not so much on their guard in advancing money upon copyhold security, as they are in lending it on freehold security. The court rolls are the ordinary evidence of a copyholder's title ; and, if a person who is going to lend money on the security of a copyhold estate, searches the rolls, and finds no incumbrance entered on them, he is warranted in presuming that none exists. Mr. and Mrs. Priestley are the instruments by which an injury has been done to our clients ; why then are they to take advantage of their legal estate in a court of equity ? *Evans v. Bicknell.*(b)

(a) See the report of this case in 6 B. & C. 484.

(b) 6 Ves. 174. See also *Plumb v. Fluit*, 2 Anstr. 437.

1827.—*Williams v. Edwards.*

Mr. *Sugden* and Mr. *Roupell*, for Priestley and wife, were stopped by the court.

Mr. *Agar* and Mr. *Seymour* appeared for the other parties.

The VICE-CHANCELLOR:—The surrender to Mrs. Priestley was made in the year 1790; and it is found, as a fact in this case, that, by the custom of this manor, there is no limited time for presenting surrenders made out of court; therefore, those who dealt with the tenant of this estate, might inform themselves of the custom. This case has been put upon the doctrine laid down by Lord Eldon, C. in *Evans v. Bicknell*. But what is the fraudulent intention or concealment imputed to Mr. and Mrs. Priestley? They are not bound to have the surrender presented, except when it suited their convenience; and, as the \*interest on their mortgage was regularly [\*78] paid, they might not think it necessary to take that precaution. They had an inchoate legal title, which they might complete whenever they pleased; and, in this case, equity must follow the law; and it has been decided that they had priority at law.

WILLIAMS V. EDWARDS.

1827; 26th and 28th November.—*Vendor and purchaser.—Specific performance.—Costs.*

One of the terms of an agreement was that the contract should be void if the purchaser's counsel should be of opinion that a marketable title could not be made by a certain time. The counsel being of that opinion, a bill by the purchaser for a specific performance, with a compensation was dismissed with costs; and an application, afterwards made by the plaintiff, that his deposit might be set off against the defendant's costs, and the surplus (if any) paid to him, was refused with costs.

THE defendant was the surviving assignee of one Abraham Stephens Racster, a bankrupt. In November, 1824, he agreed to sell to the plaintiff certain real estates, late the property of the bankrupt. The articles of the agreement were dated the 12th of November, 1824, and were as follows:—

“The said John Edwards doth agree to sell, and the said Francis Williams doth agree to purchase, at the sum of 3,305*l.*, to be paid subject to the agreement and as hereinafter mentioned, two undivided third parts or shares absolutely, and the life interest of the said bankrupt of in or to the remaining one-third part or share of and in all that copyhold messuage, or tenement, buildings, farm and lands, called or known by the name of Cobhouse, in the parish of Wickenford, in the county of Worcester, and containing by admeasurement 86 A. 3 R. 30 P., little more or less; and also of and in the two-third parts or shares in fee simple, \*and the life interest of the [\*79] said bankrupt of and in the remaining one-third part or share of and in all those freehold tenements and blacksmith's shop, and pieces or parcels of land, containing together 19 A. 3 R. 32 P., little more or less, called Boxleys,



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also situate in the said parish of Wickenford. The said John Edwards engages that the said copyhold premises are full lived, and to furnish, within one calendar month from the date hereof, a satisfactory abstract of a marketable title to the said premises; and, upon receiving the purchase money on or before the 2d day of February then next ensuing, will execute, and cause all proper parties to join in and execute proper conveyances of the said copyhold and freehold premises, and to surrender the said copyhold premises unto the said Francis Williams and his heirs, or as he shall direct, free from incumbrances, except land tax, chief rent, and the rents, suits and services due and payable for the said copyhold premises; and, on the execution of which conveyances and surrenders as aforesaid, the said Francis Williams will pay, unto the said John Edwards and the parties entitled thereto, the said purchase money of 3,305*l.*, subject as after mentioned; and shall thereupon be entitled to the rents and profits of the said premises from the said 2d day of February, up to which time all outgoing shall be paid by the said John Edwards. Errors in the description of the premises shall not vacate this agreement, but a reasonable abatement or equivalent be made or given, as the case may require. The said Francis Williams shall pay the expense of his own conveyances, and the fines and the fees for his admission to the said copyhold premises; but the said John Edwards is to be at the expense of surrendering the same. If the surrender and conveyance of the \*premises be not perfected on the said 2d day of February, the said Francis Williams shall pay interest for his purchase money, after the rate of 4*l.* per cent. per annum, from the time of his being entitled to the rents and profits. If the counsel of the said Francis Williams shall be of opinion that a marketable title cannot be made by the time hereby appointed for the completion of the said purchase, this agreement shall be void and delivered up to be cancelled. This agreement shall not be affected by any accidental damage which may happen to the said premises, between the date hereof and the time limited for the completion of the purchase; but the benefit of any then subsisting policy of insurance shall, in such case, belong to the said Francis Williams. The said John Edwards will not from henceforth grant or contract for any leases of the said premises without the consent in writing of the said Francis Williams. The delivery and production of title deeds, and the expenses of conveyances, and of attested copies, should be made and paid by the respective parties, according to the established practice in similar cases."

Shortly after the execution of these articles, the plaintiff paid to the defendant a deposit of 100*l.* in part of the purchase money. The abstract of the defendant's title having been submitted to counsel, the plaintiff was advised that the defendant could make out a good title to the fee simple of two-thirds only of the freehold part of the property, and that he was seised of the remaining third, and the whole of the copyhold part, for the life of the bankrupt only. The bill prayed for a specific performance of the agreement; [\*81] and that, if it should appear that the defendant had \*power to convey

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part of the property to the plaintiff, for the life of the bankrupt only, he might be decreed to convey the same accordingly; and that an abatement might be made, to the plaintiff, out of his purchase money. The defendant, in his answer, admitted that his title was defective as before mentioned; and submitted that, under the agreement, he was not bound to make, to the plaintiff, any allowance out of the purchase money in respect of the defect, and that the agreement was, under the circumstances, void and ought to be delivered up to be cancelled pursuant to the terms thereof.

Mr. *Heald* and Mr. *Girdlestone*, for the plaintiff, contended that the defendant was bound to perform the agreement as far as he was able, and to make an allowance to the plaintiff, in respect of his deficiency of interest in two-thirds of the copyhold premises; and they cited *Mortlock v. Buller*,<sup>(a)</sup> and *Wood v. Griffith*.<sup>(b)</sup>

Mr. *Treslove* and Mr. *Stinton*, for the defendant, cited *Hudson v. Bartram*,<sup>(c)</sup> and said that it was one of the terms of the agreement that, if the counsel of the defendant should be of opinion that a marketable title could not be made to the property, by the time appointed for the completion of the purchase, the agreement should be void; that time was here made of the essence of the contract; that the purchaser's counsel was of opinion that a marketable title could not be made, and that, therefore, the vendor was entitled \*to [\*82] say that the contract was at an end; and that there was no evidence to show that the vendor had waived the benefit of the stipulation.

The VICE-CHANCELLOR:—In this case I wished to consider the terms of the agreement before I came to any decision on the subject.

It appears to me that the doctrine relied on by the plaintiff's counsel, is not directly applicable to the case in question; because the position which my Lord Eldon lays down in the case of *Mortlock v. Buller*, is a position adopted in a variety of cases, and is a position applicable to all contracts of a general nature, where the parties themselves have not entered into a specific agreement as to some event or other which should determine the contract. Now, in this case, the parties have expressly stipulated in the first place, that errors in the description of the premises should not vacate the agreement, but that a reasonable abatement or equivalent should be given or taken, as the case may require; and then they stipulate that, if the counsel of Francis Williams, who was to be the purchaser, should be of opinion that a marketable title could not be made by the time appointed for the completion of the purchase, the agreement should be void, and delivered up to be cancelled.[1]

The agreement was made on the 12th November, 1824; and this particular clause in the agreement I must take to be the contract both of the vendor and the purchaser. They might both think that it would be equally to their

(a) 10 Ves. 292. See pp. 315, 316.

(b) 1 Swans. 43.

(c) 3 Madd. 440.

[1] Vide *Wells v. Smith*, 2 Edw. 82. Time is of the essence of a contract, where the subject of the contract is of such a nature as to be exposed to a daily variation in its value. *Deloret v. Rothschild*, 1 Sim. & Stu. 590.

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[\*83] interest that the agreement should \*be put an end to, if the counsel of the purchaser should be of opinion that a marketable title could not be made. There appears to be nothing unreasonable in that. There might be circumstances which might make it very proper for both parties to insert that term; and, as it was the contract of both the parties, this court cannot make a new contract for them. The parties themselves have stipulated that, in a given event, which happened, the agreement should be void. It appears to me, therefore, that the bill must be dismissed; and the only question is, whether it is to be dismissed with costs or not.

I find, with respect to that question, the parties have chosen to make an agreement in an unusual form, having regard to a probable contingency, which they both contemplated at the time; and the purchaser has himself stipulated that, if the event took place, the agreement should be void; and he now brings forward a case in which he says the agreement is not void. My opinion is that, if parties make a contract in this very specific manner, the court, which is to compel the specific performance of the contract between the parties, is bound by the terms of the agreement between them; and, therefore, the purchaser is asking to enforce an agreement which he has himself agreed, should, under certain circumstances, be void; and that, therefore, the bill must be dismissed with costs.

1829; 16th January.—On this day an application was made, to the court, in this cause, on behalf of the plaintiff, that the sum of 100*l.* with interest at 5*l.* per cent., the deposit paid, by the plaintiff to the defendant, on signing [\*84] the \*agreement, might be set off against the defendant's costs; and, if the deposit and interest should exceed the amount of those costs, that the surplus might be paid to the plaintiff out of the bankrupt's estate.

Mr. *Girdlestone*, in support of the application, said that it was not adverted to, at the hearing of the cause, that the purchaser had paid part of the purchase money.

Mr. *Treslove* and Mr. *Stinton*, for the defendant, said that, if the application was granted, the solicitor would be deprived of his lien for the costs, and cited *Ex parte Bryant*; (d) *Wright v. Mudie*; (e) *Smith v. Brocklesby*; (f) *Bennet College v. Carey*; (g) and *Randle v. Fuller*. (h)

Mr. *Girdlestone*, in reply, said that the cases referred to did not apply, as they were cases in which it was attempted to set off one set of costs against another; that no attempt was made to deprive the solicitor of his lien; and that here the deposit had been paid to the defendant, not in his own right, but as assignee of the bankrupt.

The VICE-CHANCELLOR:—I have no jurisdiction to grant this application. The case last cited is quite decisive upon the point. When the bill is dismissed, then arises the legal right to recover the deposit.

Motion refused with costs.

(d) 1 Madd. 49.

(g) 3 Bro. C. C. 390.

(e) 1 Sim. & Stu. 266.

(h) 6 T. R. 456.

(f) 1 Anst. 61.

1827.—*Home v. Watson.*\**HOME v. WATSON.*

[\*85]

1827; 4th and 5th December.—*Practice.—Injunction.*

A plaintiff who had obtained the common injunction, as of course, procured an order to amend, and then obtained an injunction upon the amended bill as of course; held that a special application ought to have been made.

THE plaintiff had obtained the common injunction, as of course. He then got an order to amend his bill without saving the injunction; and afterwards obtained the common injunction, as of course, upon the amended bill. The defendant now moved to discharge the order for the second injunction, for irregularity. The irregularity complained of, was that the second injunction had been obtained upon a motion of course, and not by a special application.

Mr. *Horne* and Mr. *Wakefield*, for the defendant, cited *Norris v. Kennedy*; (a) *James v. Downes*; (b) and *Vipan v. Mortlock*. (c)

Mr. *Pepys* and Mr. *Garratt*, for the plaintiff, said that, in all the cases that had been cited, the injunction had issued on merits: that, in this case, the court had never exercised its judgment upon the merits, and the injunction had been lost by amendment: and they referred to *Travers v. Lord Stafford*; (d) *Anon.*; (e) *Nelthorpe v. Law*; (f) and *Statham v. Hughes*. (g)

THE VICE-CHANCELLOR:—Where a party, having obtained an injunction, moves to amend his bill without saving the injunction, the injunction is dissolved; [1] and, if he wishes to obtain an injunction upon the amended bill, he must, in ordinary cases, make a special application for it; and [\*86] the circumstances of this case do not appear to me to afford any reason for deviating from the usual practice. Indeed the case here is stronger against the plaintiff; for his amendment of the bill dissolved the injunction. But if there is any doubt, I will desire the registrar to inquire into the practice.

5th December:—THE VICE-CHANCELLOR:—I desired the registrar to inquire into the practice. He could not find any authority expressly upon the case, but referred me to *Edwards v. Edwards*. (h) There the injunction was dissolved upon the merits; but the reasons and observations seem to throw some light upon the subject. The registrar, (i) applying his view to the case where the injunction is lost by amendment, as well as where it is dissolved upon merits, says; “This however doth not preclude a plaintiff from applying to revive the injunction on amending his bill.” Therefore, it was the opinion of the registrar that, in either case, it was necessary to apply specially. The case of *Mason v. Murray* (k) also applies to the subject. And, in The Practi-

(a) 11 Ves. 565.

(b) 18 Ves. 522.

(c) 2 Mer. 476.

(d) 2 Ves. 19.

(e) 3 Atk. 694.

(f) 13 Ves. 323.

(g) 2 Sim. &amp; Stu. 382.

(h) 2 Dick. 755.

(i) Mr. Dickens.

(k) 2 Dick. 536.

[1] Contra, *Davis v. Davis*, post, 515. In *Pratt v. Archer*, 1 Sim. & Stu. 433, it is said that a motion to amend without prejudice to the injunction was a motion of course, and might be made without notice, where the injunction had been granted on the merits; but where the injunction had issued on account of delay, notice must be given and the proposed amendments stated.

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 1827.—*Collins v. Macpherson.*


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cal Register, it is laid down that an injunction cannot be granted upon a *dedimus* to take an answer to an amended bill; but if, on the coming in of the answer to the amended bill, sufficient grounds are disclosed, the plaintiff may move for an injunction on the merits. I therefore am confirmed in the opinion, which I expressed yesterday, that the second injunction has been obtained irregularly.

Motion granted.[1]

[\*87]

\*COLLINS v. MACPHERSON.

1827; 11th December.—*Will.—Construction.*

Testator directed his executors to purchase, out of his residuary estate, a certain sum of stock, and to pay the dividends to his wife for her life, and after her death to divide the capital between such of his three daughters as should be then living: provided that, if any one of them should be then dead, or should afterwards die before her share should become payable or divisible, leaving a child or children, that share should go to such child or children. The testator's wife died in his life-time. One of the daughters died three months after the testator: held, nevertheless, that she had a vested interest in one of the shares.

WILLIAM TYLER by his will, after devising certain freehold estates, and giving several specific and pecuniary legacies, disposed of the residue of his personal estate as follows:—

“And as to all the rest, residue and remainder of my personal estate and effects, whatsoever, I give and bequeath the same unto James Collins and William Sims, upon trust that they shall, as soon as conveniently may be after my decease, set apart and lay out, in their names, such sum of money, arising from such residue, as will purchase a sufficient sum, in some or one of the public stocks or funds, to produce an income of 200*l.* per annum; and that they shall stand possessed of such stocks or funds, when so purchased and set apart, and of all

[1] The common injunction having issued against one of two defendants for want of an answer, the plaintiff afterwards, by an order of course, obtained leave to amend without prejudice to the injunction: such an order, it seems, is not irregular, and at any rate cannot be impeached by the defendant against whom no injunction has issued. Lord Cottenham observes: “In modern cases it is said that the injunction is gone by amending the bill; but that seems to be inconsistent with the general rule, that an injunction once issued cannot be discharged without an order for that purpose, which is founded upon Lord Bacon's order, and other subsequent orders. Many collateral matters may afford unanswerable grounds for dissolving an injunction, but do not of themselves effect the dissolution. A plea allowed, a dismissal of the bill, an abatement of the suit, do not dissolve an injunction; but an order for that purpose must be obtained. It is inconsistent with the terms of the common injunction ‘until answer and further order’ that the injunction should be lost by an amendment of the bill. If the plaintiff's amendment gave to the defendant a right to have the injunction dissolved, it would seem that he ought to obtain an order for that purpose; but no such form of order has been produced.” *Ferrand v. Hamer*, 4 Myl. & Cr. 143. Mr. Hoffman is of opinion that in the court of chancery of New York, the injunction does not drop merely upon an amendment, and that in an order for leave to amend, it is unnecessary to introduce a reservation in favor of the injunction. 1 Hoff. Ch. Pr. 301. But the amendment of an injunction bill, after answer, is not of course but upon motion. *Rogers v. Rogers*, 1 Paige, 424. And see *Pickering v. Hanson*, post 468. *Davis v. Davis*, post 515.

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the dividends or interest to arise thereon, in trust to pay such dividends or interest unto my wife Sarah Tyler, during her life ; and, from and immediately after the decease of her my said wife, I do hereby direct and declare that they, my said trustees for the time being, shall stand possessed of and interested in the said stocks or funds so to be purchased by them as aforesaid, in trust thereout to transfer, unto my son John Tyler, so much thereof as will produce the sum of 1,000*l.*, to be received by him in lieu of payment for all sugars he may have supplied me and my family with during my life : but, if my \*said son shall call for and obtain payment for all or any part of such [\*88] sugars, then I direct that he shall only be paid such farther sum as will make up the said 1,000*l.*, and he shall not, in that case, be entitled to any further sum of money as a legacy under this my will (save and except the before-mentioned 50*l.*, and the proportionate share of the residue of my estate hereinafter bequeathed to him,) and that the residue of the said 1,000*l.*, in such last-mentioned case, shall go into the general residue of my personal estate : and, as to the remainder of the stocks or funds so to be purchased by my said trustees as aforesaid, after deducting the above-mentioned legacy of 1,000*l.* to my said son John Tyler, upon trust that they the said James Collins and William Sims do and shall, as soon as conveniently may be after the decease of my said wife, pay and divide the same equally between and amongst my daughters Henrietta Newham, Anne Macpherson, and Sophia Huddlestone, or between and amongst such of them as shall be then living, but subject to the proviso next hereinafter contained, (that is to say) provided, always, that, if either of them my said daughters Henrietta, Anne, or Sophia, shall, at the decease of my said wife, be dead, or shall afterwards die before her one-third share of the said last-mentioned money or stock shall become payable or divisible, leaving a child or children, then my will and mind is that such last-mentioned child or children, if more than one, shall take and be entitled to have the original share of their parent between and amongst them, and which last-mentioned share shall, in such last-mentioned case, become payable or transferable to him, her or them, if more than one, in equal shares, with all intermediate \*accumulations [\*89] thereon, on such of them as shall be sons attaining the age of twenty-one years, and on such of them as shall be daughters attaining that age or being married, which shall first happen, and with benefit of survivorship between such last-mentioned child or children in the mean time ; and if there shall be only one such child, then that such only child shall take and be entitled to his or her parent's one-third share of such last-mentioned sum of money or stock, payable at the time and in the manner aforesaid : but, if either of them my said daughters Henrietta, Anne, and Sophia, shall, at the decease of my said wife, be dead, or shall afterwards die before her share of the said money or stock shall become payable or divisible, without leaving a child or children, or leaving such, and they shall all die without attaining the age of twenty-one years, or otherwise acquiring a vested interest in such share of the said trust monies, then that such last-mentioned share shall go and be divided between and

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 1827.—*Collins v. Macpherson.*


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amongst my said other children and children's children as hereinbefore mentioned. And I direct and declare that neither of my daughters hereinbefore mentioned shall have any disposing power, by way of anticipation, sale, mortgage, assignment or otherwise, in or over any of the legacies or bequests hereinbefore or hereinafter by me given or bequeathed to them respectively. [Here was inserted a declaration that the receipts of the daughters, notwithstanding their coverture or any disposition they might make of their legacies, should be the only sufficient discharges to the trustees.] And I further declare, that no

part or parts of such respective legacies or bequests shall be subject or [\*90] liable to the control, debts or engagements \*of any husband or husbands they my said daughters have married, or may hereafter marry, nor shall any part or parts of such respective legacies or bequests pass by any mortgage, assignment or transfer, made or to be made by such husband or husbands. And my will and mind further is, that they the said James Collins and William Sims, or the survivor of them, or the executors or administrators of such survivor, shall and do, after paying the aforesaid legacies, and setting apart the aforesaid several sums of money, as soon as conveniently may be after the decease of my said wife, divide the money arising from the sale of my real estate, and the residue of my said personal estate, into five equal parts or shares, and pay and apply one of such shares unto each of my said children, Henrietta Newham, Anne Macpherson, Sophia Huddleston, John Tyler, and my grand-daughter, Charlotte Bennett, to and for his, her and their respective absolute use and benefit; but, in case any or either of my last-named children, or my said grand-child, shall die, in my lifetime, or without acquiring a vested interest in the division of the said last-named residue, then my will and mind is that the share or shares of him or her so dying shall go and be divided in such and the same manner as is hereinbefore mentioned and expressed concerning the residue of the money to arise from the sale of the stocks or funds which I have hereinbefore directed to be purchased for securing to my said wife an annuity of 200*l.* or as near thereto as parties and circumstances would admit."

And the testator authorized his trustees to apply the income of all or [\*91] any of the funds appropriated \*under the trusts of his will, for the benefit of his children who might be infants, or for the child or children of such of them as should die leaving a child or children surviving who should not have attained the age of twenty-one years, or have otherwise acquired a vested interest in such trust funds, and that the surplus income should be laid out and accumulated for the benefit of the person entitled to the principal; and the testator appointed his wife and the plaintiff's executrix and executors of his will.

The testator's wife died in her husband's lifetime; and, on the 11th of February, 1824, the testator died, leaving Anne McPherson, Henrietta, the wife of John Newman, and Sophia, the wife of Gent Huddleston, surviving him. Anne Macpherson died on the 28th of May, 1824, which was about three

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 1827.—*Collins v. Macpherson.*


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months after the testator. She left three infant children, one of whom died before the suit was commenced.

The bill was filed by the two surviving executors; and, after stating the facts before mentioned, it alleged that Mrs. Macpherson died before her share or interest under the testator's will had been paid or secured to her: that, on the 11th of February, 1825, being one year from the testator's death, and the time at which the plaintiffs were advised that the legacies given by the will ought to have been paid, the fund required to purchase an annuity of 200*l.* in the three per cent consols, was 6,250*l.* but the assets of the testator were sufficient to pay 5,620*l.* only; and accordingly the plaintiffs, after deducting therefrom the legacy of 1000*l.* given to John Tyler, divided the remaining \*4,620*l.* into three parts, and paid one third part to Mrs. Newham, [\*92] another third part to Mrs. Huddleston, and invested the remaining one-third in the purchase of 1,623*l.* 5*s.* 3*d.* three per cent consols, subject to the trusts to which the same was applicable, that Philip Macpherson alleged that his wife having survived the testator, acquired a vested interest in the property bequeathed to her, and that he, as her administrator, was entitled to the 1,623*l.* 5*s.* 3*d.* three per cent consols, notwithstanding she died before her share was paid to her; whereas her children, and her sisters and their husbands, alleged that she, having died before her share became payable to her, never acquired a vested interest therein, but that it belonged to her children; and, in case they should all die under twenty-one, that it would belong to Mrs. Newham and Mrs. Huddleston. The bill prayed that the rights and interests of the defendants to and in the 1,623*l.* 5*s.* 3*d.* three per cents, might be ascertained and declared by the court.

Mr. *Pemberton*, for the plaintiffs.

Mr. *Ching*, for Mr. and Mrs. Newham.

Mr. *Heald* and Mr. *Roots*, for Mr. Macpherson:—The question which arises upon the proviso in this will, is whether Mrs. Macpherson was entitled to this sum at the time when she died, or whether her children have become entitled to it. It seems absurd to say that, because the trustees neglected to sell out the stock, the property is to go to the children. The testator in a subsequent part of his will, says: "But in case any \*or either of [\*93] my said last-named children, or my said grand-child, shall die in my life-time," &c. It seems, therefore, that the testator contemplated the possibility of his children dying in his life-time; and the only rational construction that can be put upon the words "payable and divisible" in this proviso, is to hold that the testator intended, when he used them, to provide for the same event.

Mr. *Collinson*, for the children of Mr. and Mrs. Macpherson:—The period at which Mrs. Macpherson would have become entitled to her share of the stock directed to be purchased, had not arrived when that lady died. The property which the testator directed to be invested in the funds, was part of his residuary estate. At what period was it payable and divisible? Not until twelve months after the death of the testator. If this construction is not



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adopted. the court will either be under the necessity of striking out some of the words of the will ; or must say that the testator, when he speaks of his wife's death, meant his own. What he meant was, that Mrs. Macpherson should have her share, in case she was alive when the period arrived at which the fund would, by the rules of this court, be divisible. By "payable and divisible" the testator meant "paid and divided;" and that, if his daughters received the money, they were to keep it, but if not, that it was to be paid to their children. Besides, the testator has used words expressly to exclude the husbands from taking.

Mr. *Crombie*, for Mr. and Mrs. Huddleston.

[\*94] \*The Vice-Chancellor, in the course of the argument, asked when Mrs. Macpherson's share would have become payable, supposing she had lived five years after the testator ; and, at the conclusion of it, said that, though it was not very clear, yet, taking the whole of the will together, he was of opinion that Mrs. Macpherson became entitled, at the death of the testator, to a share of the stock directed to be purchased.

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\**HOUGHAM V. SANDYS*.

1827; 14th, 15th, 17th, and 28th December.—*Appointment.—Conversion.—Will.—Construction.* By Mr. and Mrs. P.'s marriage settlement, estates in Kent and other counties, the lady's property, were settled on her for life, remainder to Mr P. for life, if she should so appoint, remainder to their children, remainder as Mrs. P. by deed under her hand and seal, attested, &c. or by her will, signed and published in the presence of three witnesses, should appoint; remainder to Mrs. P. in fee, with a power of sale, and directions for re-investing the proceeds in other estates, and, in the usual securities, in the interim, and that, upon the re-investment, the uses of the settlement should cease as to the sold estates. Mrs. P., by deed not attested as to her signature, (at the foot of which she had written, without date, directions for her burial,) appointed the estates, after her decease, to her husband for life, and, in default of children, to him in fee; and she revoked a prior deed of appointment. The estates were afterwards sold, and the proceeds invested in securities, but were never re-invested in lands, although their liability to be so was recognized by the parties. There was no issue of the marriage. Mrs. P. survived her husband, and applied part of the proceeds to her own use. At her death, she was seized (exclusive of the settled property) of a mansion-house, with outbuildings, gardens, and a small field adjoining it, and some cottages opposite to it, let to tenants, and was possessed of some personal estate, no part of which was in the name of a trustee. She devised the mansion-house, with its appurtenances, and all other her real estates, to C. S., and bequeathed all her personal estate, whether in the name of herself or of any trustee, subject expressly to her debts and legacies, to other persons. After her death, the deed of appointment was found, in her house, with the title-deeds of the mansion-house; but the revoked deed could not be found. Her debts and legacies greatly exceeded her assets. Held that the former deed was not a testamentary instrument, and that Mrs. P.'s receiving part of the proceeds of the settled estates, was not an entry or claim within the 54 G. 3, c. 168, but that that statute remedied the defect of attestation: that the remaining proceeds remained as real estate, but did not pass either to the devisee or the residuary legatees in the will; that Mr. P.'s co-heirs in Gavelkind were not entitled to any part, but that the whole belonged to his heir at law, under the appointment.

By indentures of lease and release, dated the 1st and 2d of May, 1760, the release being made between Ann Pyott, spinster, the only child of Charles

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Pyott, thereafter named, by Ann his late wife deceased, who was one of the three surviving daughters and co-heirs \*of Sir Richard Sandys, [\*96] baronet, deceased, of the first part, the said Charles Pyott, of the second part, Robert Thomas Pyott, esquire, of the third part, and John Knowler, esquire, and Peter Johnson, esquire, of the fourth part, and by a fine levied in the 33 Geo. 2, being the settlement on the marriage of Ann Pyott and Robert Thomas Pyott, (who were related to each other before their intermarriage,) one undivided third part of several closes, tenements and hereditaments, being part of a farm called Bishop's Lathers, otherwise Bishop's Fields, situate in the parish of Bishop's Hill Younger, otherwise Bishop's Hill Newer, in the county of the city of York, and also of a capital messuage or mansion-house, situate in the parish of Northborne, in the county of Kent, with the lands and grounds thereto belonging; and also of a messuage and farm, called Northborne Court Lodge, situate in the parishes of Northborne and Shoulden, or one of them, in Kent; and also of a messuage and farm, called Longdane Farm, situate in the parish of Northborne aforesaid, and also of a messuage or tenement and farm, called Cold Harbor, situate in the parishes of Northborne and Shoulden aforesaid, or one of them; and also of those three closes, called Ripple Closes and Sutton Close, situate in the parishes of Ripple and Sutton, or one of them, in Kent; and also of a messuage or tenement and farm, called Stoneheap Farm, in the parishes of Northborne aforesaid, and Tillmanstone, or one of them, in Kent: and also of the tithes of corn and grain of certain lands, called the Lord's lands, and other lands of Thomas Stone of Deal; and also of that messuage or tenement, called Drove, with the orchard belonging to it; and of and in all other the messuages, farms, lands, tithes, tenements \*and hereditaments whatsoever of Ann Pyott and Charles Pyott, or [\*97] either of them, situate in the said parishes, or elsewhere, in Kent; and all other the manors, messuages, lands, tenements and hereditaments whatsoever of the said Ann Pyott, in the same county, in the county of the city of York, and in the counties of Somerset and Salop, or elsewhere in Great Britain, with their appurtenances, were conveyed, limited and assured unto and to the use of the said John Knowler and Peter Johnson, in fee, upon trust, after the solemnization of the marriage, to pay, during the life of Ann Pyott, the rents and profits thereof to Ann Pyott, for her separate use; and in case she, by any deed or deeds, writing or writings under her hand and seal, attested by two or more credible witnesses, or by her last will and testament in writing, to be signed, published and declared as therein mentioned, should direct and appoint the rents and profits of the premises to be paid, after her decease, to Robert Thomas Pyott for his life, then upon trust to pay the rents and profits of the premises unto Robert Thomas Pyott during his life; and, after the death of Robert Thomas Pyott, in case of such direction or appointment to him, or, in default thereof, then after the death of Ann Pyott, upon trust to stand seised of the premises in trust for all the children of Robert Thomas Pyott on the body of Ann Pyott to be begotten, for such estate and estates, &c., as Ann Pyott and

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Robert Thomas Pyott should, jointly, during their joint lives, or as the survivor of them should, in manner therein mentioned, appoint; and, in default of such appointment, in trust for all their children, in equal shares, as tenants in common in tail, with cross-remainders between or amongst them in tail, [\*98] with remainder in trust for such person and persons, \*for such estate and estates, in such parts and proportions, and charged and chargeable with such rents, annuities, sum or sums of money, payable either annually or otherwise, and in such manner and form, with or without power of revocation, as Ann Pyott should, from time to time, notwithstanding her coverture, and whether she should be sole or married, by any writing or writings under her hand and seal, attested by two or more credible witnesses, or by her last will and testament, or by any writing purporting to be her last will and testament, to be by her signed and published in the presence of three or more credible witnesses, appoint; and, in default of such appointment, in trust for Ann Pyott, in fee.

By the indenture of release it was declared that it should be lawful for Mr. and Mrs. Pyott, at any time or times during their joint lives, and, in case Mrs. Pyott should survive Mr. Pyott, for her, at any time or times during her life, with the consent and approbation of the trustees or trustee for the time being, to sell all or any part of the said undivided third part, and other parts and shares of the said messuages, lands, tenements and hereditaments, in the county of Kent, and in the county of the city of York, and all or any part of the premises in the said counties of Somerset and Salop, or elsewhere in Great Britain, or, otherwise, to make any exchange or exchanges of all or any part of the said undivided third part, and other parts and shares, and other the premises, with any person or persons, for any other freehold lands, tenements and hereditaments of inheritance, or, otherwise, to make a partition or division of all or any part of the said messuages, lands, tenements and hereditaments, so always that the moneys arising by such \*sale of all or any part of the said undivided third part, and other parts and shares, and of other the premises, should be laid out in the purchase of other lands, tenements and hereditaments being freehold of inheritance; and the lands, tenements and hereditaments so to be purchased, or the lands, tenements and hereditaments to be taken in exchange, or the lands, tenements and hereditaments, upon such partition or division, to be allotted for and in lieu of all or any part of the same undivided third part, and other parts, shares and premises, should, thereupon, be conveyed, assured and settled to and for the same, or the like uses, intents and purposes, and upon the same or the like trusts, and under and subject to the same or the like agreements, as the said undivided third part, and other the premises thereby granted and released, were thereby conveyed and limited, or as near the same as the then circumstances of the case would admit; and that then, and in such case, all and every the estates, uses, trusts and agreements thereinbefore conveyed, limited, declared and mentioned, of and concerning the premises, or such part thereof which should be so sold or given,

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in exchange, or of which such partition or division should be made, should cease, determine, and be utterly void to all intents and purposes whatsoever.

By a deed poll, bearing date the 14th of April, 1761, under the hand and seal of Ann Pyott, and executed by her in the presence of three witnesses, she by virtue of the power and authority to her reserved by the settlement, appointed the rents and clear yearly profits of all the settled premises, from and immediately after her death, in case she should leave any children or child by her husband Robert Thomas Pyott living at the \*time of her [\*100] death, unto her said husband for his life, and, after his decease, she directed and appointed the said premises unto the child or children which she should leave by him living at the time of her death, in fee; but, if she should leave no such child, then, from and immediately after her death, she appointed the said premises unto and to the use of her said husband, in fee; and she thereby revoked a certain deed poll, bearing date the 20th June, then last, purporting to be an appointment by her of the same premises to other uses. And the deed poll of April, 1761, also contained a proviso that it should be lawful for Ann Pyott, at any time or times thereafter, notwithstanding her coverture, by any writing under her hand and seal, or by her last will and testament, to be by her signed, sealed and executed in the presence of three or more credible witnesses, to revoke the same deed poll; and, by the same or any other writing or writings, to be by her signed, sealed and attested as aforesaid, to appoint any new uses of or concerning the same premises, with like power of revocation to be therein contained, and so, from time to time, as often as she should think fit.

John Knowler, one of the trustees of the settlement, died in July, 1763, leaving Peter Johnson his co-trustee him surviving; and, in or about the year 1773, Mr. and Mrs. Pyott, with the consent of Peter Johnson, sold their shares of the premises situate in the counties of Somerset and Salop, to Richard Sandys, esquire, for 1,100*l.*: and in the conveyance thereof, was a recital that it had been agreed, between the parties thereto, that the 1,100*l.* should be laid out and invested in some of the public funds, until a suitable and convenient \*purchase, of lands and hereditaments in fee simple, [\*101] could be had, wherein to invest the same, pursuant to the proviso and direction in the settlement in that behalf contained; and that, in the meantime, the interest and dividends of the stock to be purchased therewith, should be paid and applied for the benefit of such person and persons, and for such intents and purposes, as the rents and profits of the hereditaments so directed to be purchased, would be applicable, in case the same were actually so purchased and settled according to the directions of the settlement.

In pursuance of this agreement the 1,000*l.* was laid out in the purchase of 1,807*l.* 11*s.* 6*d.* New South Sea annuities, in the name of Peter Johnson.

In or about the years 1795 and 1796, Mr. and Mrs. Pyott, with the consent of Peter Johnson, sold the third part of the premises in Kent and the county of the city of York, except Stoneheap Farm, and the tithes before mentioned,

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to different persons, for sums of money amounting to 14,206*l.* 13*s.* 4*d.*; and, in the conveyances thereof to the purchasers (except only in the conveyance to the purchaser of the site of Northborne Court and Longdane Farm,) it was recited that it was proposed, amongst the parties to such deeds, that the purchase moneys for the estates respectively thereby conveyed, should be laid out and invested in some of the public funds, or on mortgages of freehold estates of inheritance in fee simple, of sufficient value, free from incumbrances, in Johnson's name, until a suitable and convenient purchase, of lands and hereditaments in fee simple, could be had wherein to invest the same, pursuant to the proviso contained in the settlement; and \*that, in the meantime, the dividends and interest of the stocks or securities on which the same should be invested, should be paid and applied to and for the benefit of such person and persons, and for such intents and purposes, as the rents and profits of the hereditaments, so directed to be purchased, would be applicable, in case the same were so actually purchased and settled, according to the direction of the settlement. And, in the conveyances of the York estate, Johnson covenanted with the purchasers thereof to apply the purchase money upon the trusts declared, by the settlement, of the purchase moneys to arise from the sale of the hereditaments and premises therein mentioned.

The 14,206*l.* 13*s.* 4*d.* were disposed of in the portions and manner following:—3,333*l.* 6*s.* 8*d.* were, in or about the year 1795, laid out in the purchase of the other two-thirds of Stoneheap Farm, and of the tithes before mentioned; and those two-thirds were conveyed to Johnson in fee, upon the trusts of the settlement: 8,900*l.* were, on the 26th December, 1795, advanced to Thomas Tireman and Ann his wife, and George Ellin and Mary his wife, upon mortgage of the entirety of the before-mentioned hereditaments in the county of the city of York, in Johnson's name: 1,000*l.* were, on the 6th of April, 1795, advanced to Henry Godfrey Faussett; upon mortgage of hereditaments in the parishes of Nether and Upper Hardres, or one of them, in Kent, in Johnson's name: 303*l.* 13*s.* 6½*d.* were applied in payment of the costs and expenses attending the sales: 333*l.* 6*s.* 8*d.* were applied in paying off a proportion of a mortgage of 1,500*l.* on the entirety of the said estates, to the representative of Charles Pyott, the father of Mrs. Pyott: and 336*l.* 6*s.* 5½*d.* were [\*103] \*applied, with other moneys belonging to Mr. and Mrs. Pyott, in lending 500*l.* to Sarah Nott, on her note.

By an indenture, dated the 14th of January, 1796, and made between Mr. and Mrs. Pyott, of the one part, and Peter Johnson of the other part, after reciting the sales of the settled property, and that Johnson had, at the request of Mr. and Mrs. Pyott, executed the conveyances of the before mentioned estates, and signed the receipts on the back thereof but that Johnson did not actually receive any part of such sums: it was witnessed that Mr. and Mrs. Pyott did thereby acknowledge that Johnson did not, on executing, and signing receipts on the several conveyances, actually receive any part of the sums of money before mentioned, but that such of the same sums as had been already paid,

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had been paid to Mr. and Mrs. Pyott, and, therefore, they released Johnson from all those sums, except such of them as had been laid out in Johnson's name: and Mr. and Mrs. Pyott covenanted with Johnson, that they would, as soon as conveniently might be, lay out and invest such of the sums as had been already received, and not laid out and invested, and also the other sums, as from time to time they should receive the same, amounting altogether to 14,206*l.* 13*s.* 4*d.* in the purchase of free-hold lands free from incumbrances, or in the purchase of stock in the funds, or on mortgage of freehold estates, free from incumbrances, of good and sufficient value, in the name of Johnson, to be conveyed, assigned and transferred to Johnson and his heirs, upon the uses and trusts declared, in the settlement, of the estates so sold and disposed of. And, by the same indenture, Johnson covenanted, with Mr. and Mrs. Pyott, that, \*from time to time, when the several sums amount- [\*104] ing to 14,206*l.* 13*s.* 4*d.* or any part thereof, should have been so laid out and invested as aforesaid, he would stand possessed of the freehold estates, stocks, funds and securities, so to him to be conveyed, assigned and assured, upon and for the uses, trusts and purposes declared, in the settlement, concerning the estates so sold, or upon such of them as were then undetermined and capable of taking effect.

Mr. Johnson died on the 1st August, 1796, leaving the defendant Sir Robert Johnson Eden, then Robert Eden, esquire, his grandson and heir at law.

In the year 1800 Mr. and Mrs. Pyott, under the power of sale in the settlement, sold the entirety of Stoneheap Farm, and of the before mentioned tithes, for 5,000*l.*, and required Robert Johnson Eden, as the heir at law of Peter Johnson, to join in such sale, which he accordingly did; and, in the conveyance thereof to the purchaser, was contained a recital, similar to that contained in the former conveyances, as to the application of the purchase money, until a purchase of other lands could be effected; and 2,500*l.*, part of such purchase money, was left upon mortgage of Stoneheap Farm, but was afterwards paid off, and the money received by Mrs. Pyott; and 1,500*l.*, further part thereof, was, on the 19th of April, 1800, advanced to Henry Godfrey Faussett, and secured upon mortgage of the manor of North Court, and certain hereditaments in the parishes of Nether and Upper Hardres, Patrixbourne and Bridge, in Kent, in the name of Robert Johnson Eden; and 1,000*l.*, residue of the 5,000*l.*, was laid out, in the name of Robert Johnson Eden, in the purchase of \*1,079*l.* 5*s.* 6*d.* five per cent. annuities, but which were afterwards [\*105] sold, and the money received by Mrs. Pyott.

Mr. and Mrs. Pyott, never had any issue. Mr. Pyott died in July, 1804, intestate as to his real estates, leaving Mrs. Pyott him surviving; and, by his will, dated the 28th February, 1789, he bequeathed his personal property to her, and appointed her his executrix. Mrs. Pyott died in July, 1816.

It was supposed, when and before the bill was filed and was so stated in it, that, at Mr. Pyott's decease, Mrs. Pyott was his heir at law, they, as is before mentioned, having been related to each other before their intermarriage; but,

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in the progress of the suit, it was discovered that, when that event took place, Sir Robert Johnson Eden was his heir at law ; and his co-heirs in Gavelkind were Sir R. J. Eden, Morton John Davison, esquire, and Mrs. Pyott.

At Mr. Pyott's death the whole of the estates comprised in the settlement had been sold, and the produce of the sales consisted of 1,307*l.* 11*s.* 6*d.* New South Sea annuities, standing in the name of Peter Johnson or his representatives, the mortgages for 8,900*l.*, 1000*l.*, 2,500*l.*, and 1,500*l.*, the sum of 336*l.* 6*s.* 5½*d.* lent, with other monies, to Sarah Nott, and 1,079*l.* 5*s.* 6*d.* five per cent. annuities standing in the name of Sir Robert Johnson Eden. After Mr. Pyott's death, the 1,307*l.* 11*s.* 6*d.* New South Sea annuities, were transferred into the name of Mrs. Pyott, and added to a sum of 2,900*l.* like annuities, to

which she was entitled, under the will of her father Charles Pyott, [\*106] making together 4,207*l.* \*11*s.* 6*d.* New South Sea annuities, and 3,707*l.* 11*s.* 6*d.* part thereof was, at different periods, sold and disposed of by Mrs. Pyott in her lifetime, and the remaining 500*l.* was sold and disposed of by her executors, after her death. After Mr. Pyott's death the 1,079*l.* 5*s.* 6*d.* five per cent. annuities also, were transferred into Mrs. Pyott's name, and were sold out by her on the 20th March, 1807, and she received the 2,500*l.* left on mortgage of Stoneheap Farm, and also changed the security for the 500*l.* lent to Sarah Nott, and took a bond for that sum in her own name, in lieu of the promissory note.

Mrs. Pyott, by her will, dated the 15th of March, 1805, duly signed, published and attested, for passing freehold estates of inheritance, after giving several legacies and annuities, and devising, unto George Loop for his life, her cottage or tenement, with the garden, hereditaments and appurtenances to the same belonging, situate in the parish of St. Martin within the liberties of the city of Canterbury, and then in the occupation of Mary Cook ; as to her capital messuage or mansion house, wherein she then lived, and the ground and appurtenances to the same belonging (which were situate in the same parish,) and all and singular other her messuages, lands, tenements and hereditaments, and parts and shares of any messuages, lands, tenements and hereditaments, and all other her real and leasehold estates, whatsoever and wheresoever, subject to such estate and interest, of and in her said cottage or tenement and premises in the occupation of the said Mary Cook, as she had before given to the said George Loop, she gave, devised and bequeathed the same respectively, with their respective rights, members, and appurtenances unto the plaintiffs [\*107] \*William Hougham, and Richard Frend, and George Carter, their

heirs, executors, administrators and assigns, to the use of the defendant Charles Sandys, for ninety-nine years, to commence from the day of her decease, if he should so long live, he and they keeping the said capital, messuage, buildings, and other the said trust premises in good and substantial repair ; and, from and immediately after the determination of that estate, in the lifetime of Charles Sandys, to the use of the plaintiffs and George Carter, and their heirs, during the life of Charles Sandys, in trust to preserve contingent

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remainders; and, after the decease of Charles Sandys, to the use of his first and other sons in tail male; and, for default of such issue, to the use of the defendant Edwin Sandys, for ninety-nine years, to commence from the day of the decease of Charles Sandys without issue male of his body, or from failure of such issue male after his decease, as the case might be, if he, the defendant Edwin Sandys, should so long live, he and they, in the like manner, keeping the trust premises in good and substantial repair; and, after the determination of that estate in the lifetime of Edwin Sandys, to the use of the same trustees, during the life of Edwin Sandys, in trust to preserve, &c.; and, after the decease of Edwin Sandys, to the use of his first and other sons, in tail male, with divers remainders over.

And the will contained a power enabling Charles Sandys and the other devisees, when they should be in possession or be entitled to the rents and profits of the estates and premises thereby devised, to lease the same or any part or parts thereof, for fourteen years, in possession, at the best improved yearly rent, without taking any fine, and so as none of the lessees \*should [\*108] be made punishable of waste, and every such lease should contain a power of re-entry for nonpayment of rent; and the same persons were forbidden to let the mansion house for a mess house, barrack, boarding or lodging house, or for any purpose except the residence of a private family.

And the testatrix's will was that all the household goods, household furniture, books, pictures, silver plate and china, that should be in or about her said capital messuage, and the buildings and gardens thereto belonging, at the time of her decease (except such of them as she should otherwise dispose of by any codicil or codicils to that her will,) should be deemed as heir looms, and forever be enjoyed, as far as the law would admit, by the person and persons who, for the time being should be in possession of, or entitled to the rents and profits of the same capital messuage, buildings, gardens and premises, by virtue of her will. And the testatrix directed that, as soon as conveniently might be after her decease, her trustees and executors should cause an inventory to be made of all the household goods, furniture, pictures, books, silver plate and china, which were to continue and remain and be used in the same capital messuage, buildings and gardens according to her will; and that Charles Sandys, and other persons, who by virtue of her will, were to have the use of the said goods, should, at or before the time of taking possession thereof, give a receipt for the same, under their respective hands, at the foot of the inventory. And the testatrix thereby also gave and bequeathed unto Charles Sandys, for his own use and benefit, all her household linen, jewels, trinkets and other effects, (except as thereinbefore was excepted, and except ready \*money, and [\*109] money and securities for money,) which should be in or about her said capital messuage and premises at the time of her decease, and which she should not otherwise dispose of by any codicil or codicils to her will.

And, as to all her ready money and securities for money, money in the public stocks or funds, debts which should be due and owing unto her at



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the time of her decease, and all other the rest and residue of her personal estate, whatsoever and wheresoever, and of what nature, kind or quality soever the same should consist or be, at the time of her decease, which she had any right or power to dispose of, not therein otherwise disposed of, and which she should not otherwise dispose of, and whether such property respectively should be vested or standing in her own name, or in the name or names of any person or persons in trust for her, or for her use and benefit, and subject to the payment of her just debts and funeral expenses, the charges of proving her will, and other incidental expenses touching the same, and after the payment of the several legacies and annuities by her thereinbefore given and bequeathed, and to be thereafter given or disposed of, by any such writing or writings as aforesaid, she gave and bequeathed the same, and every part and parcel thereof, and all her estate, right, title and interest therein respectively, unto the plaintiffs and George Carter, their executors, administrators and assigns, upon trust, as soon as conveniently might be after her decease, to sell and convert into money all such part or parts of her personal estate as should not consist of money or securities for money, and also to receive and get in all such part and parts thereof as should consist of money and securities for money, and there-  
 [\*110] upon, or with all convenient \*speed, to lay out and invest the monies arising thereby in the purchase of capital stock, in some one or more of the public stocks or funds of this kingdom, in the names of her said trustees, or the survivors or survivor of them, or the executors or administrators of such survivor, and to stand possessed of all such capital stock so to be purchased, and the yearly dividends, interest and produce thereof, and also the capital stock which she should be possessed of or entitled unto, and the yearly dividends, interest and produce thereof, upon trust for all and every the children of her cousin Edwin Humphrey Sandys lawfully begotten and to be begotten, as well sons as daughters, and all and every the children of Henry Godfrey Faussett, on the body of Susan, the testatrix's cousin, his late wife, deceased, lawfully begotten, including her late husband's godson the defendant Robert Faussett, and her god-daughter the defendant Anne Faussett, notwithstanding their respective legacies thereinbefore mentioned, equally to be divided between the said children respectively, share and share alike, and their several and respective executors, administrators and assigns, without regard to the number there might be of each family, and as if they were all the children of the same father; the parts or shares of such of the said children as were or should be sons to be assigned, transferred and paid unto them, severally and respectively, when and as they should attain the age of twenty-one years, and the parts or shares of such of them as were or should be daughters to be assigned, transferred and paid unto them, severally and respectively, when as they should severally attain that age, or be married, which should first happen, with benefit of survivorship, amongst the said children, if any one or more of  
 [\*111] them, being a son or sons, should \*happen to die under the said age, or, being a daughter or daughters, should happen to die under the said

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age and without having been married. And she thereby appointed the plaintiffs and the defendant George Carter joint executors of her will.

The testatrix made a codicil, dated the 2d of March, 1813, and thereby, after reciting the bequest, in her will, that her household goods, furniture, &c. should be deemed as heir-looms to her capital messuage, buildings, gardens and premises. revoked the said bequest, and gave those articles unto Charles Sandys absolutely.

The testatrix died on the 24th of July, 1816 : and, on the 24th of August following, the plaintiffs Hougham and Frend, alone, proved her will and codicil, and took upon themselves the execution of the trusts thereof, the defendant George Carter having declined to join with them in so doing.

At the testatrix's decease, Sir R. Johnson Eden was her heir at law, and also the heir at law of her late husband : and Sir R. J. Eden, and Mr. Morton John Davison. were the co-heirs in Gavelkind of the same two persons.

The testatrix, at her decease, was seised of no real estates not included in her marriage settlement, except her property in St. Martin's parish, in or near to Canterbury, and which consisted of a mansion-house (in which she resided,) with coach-houses, stables and other out buildings, fit for the residence of a large family, and gardens, a shrubbery, and a small field, containing \*two roods and five perches, adjoining the mansion-house, a small [\*112] piece of ground opposite to the door of the mansion-house, and five small cottages, which were separated from the mansion-house by a turnpike road, one of which she devised to Loop for his life, as before mentioned, and the others were let to different tenants, at rents amounting to 13*l.* 7*s.* per annum.

The testatrix, when she made her will, was entitled to some funded property, and two sums secured by bonds, none of which were in dispute in this cause ; but, at her death, her personal estate, if the sums in question in this cause were not to be included in it, was not nearly sufficient to pay her debts, funeral expenses and legacies ; and no part of her personal estate was then standing in the name of a trustee.

After the testatrix's death, the deed-poll of April, 1761, was found amongst the title-deeds of the property in St. Martin's parish : and, at the foot of it were written, in the hand-writing of the testatrix, but without date, directions as to the time, place and manner of her burial ; and the mortgage deeds for securing the sums of 8,900*l.*, and 1,000*l.* and 1,500*l.* were also in her possession at her death : but the deed-poll of June, 1760 could not be found.

At the testatrix's decease, the produce of the settled estates sold as before mentioned, and which had not been received or disposed of by her, consisted of the mortgages for 8,900*l.*, 1,000*l.* and 1,500*l.* ; and the 500*l.* lent to Sarah Nott, were unpaid.

Edwin Humphrey Sandys, the father of the defendant Charles Sandys, and a witness in the cause for \*him and the other devisees under [\*113] Mrs. Pyott's will, deposed that he was employed by Mr. and Mrs. Pyott, as their solicitor, in the sales before mentioned ; and that he was em-

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ployed, by all the parties interested in such sales, in investigating and making abstracts of the titles of the premises sold, and in preparing the conveyances to the several purchasers thereof; and that, on the occasion of any such sales, or on completing the same, or making out the title to the premises, the deed-poll of April, 1761 did not form part, nor was considered to form part of the title, or of the evidence of the title, of Mr. and Mrs. Pyott, to their share of the premises, or any part thereof; and that such deed-poll was not noticed, or in any manner used on the occasion of any such sales, or in any abstract of title made out on the occasion thereof, or of any conveyance executed in pursuance thereof. The evidence of John Jennings, who was the managing clerk of Edwin Humphrey Sandys at the times of the sales, was to the same effect; and he added that he never knew or heard of the existence of the deed-poll until three months before his examination, when he was informed of it by the defendant Charles Sandys.

The two following letters were proved in the cause, on behalf of the devisees. The first was dated the 22d of September, 1793, and was from Mr. Pyott to Mr. Faussett, and contained the following passages:—"I am very glad you approve of my hint of planting more alders upon Northbourne Farm. Legeyt (a surveyor) knows the worth of wood in that country. He, I dare say, will approve for his employers. Edwin, who has now the greatest share, must see the consequence in a few years; for I have not the least doubt that, in [\*114] the \*course of ten years, the wood, felled upon the estate, will pay the annual expense of repairs. I have the least interest in it, as my life is not worth ten years purchase, and as the estates will not go to my family."

The second was written on the 2d of June, 1794, by Mr. Pyott to Mr. Edwin Humphrey Sandys, his solicitor, and related to the sales. It contained the following passage: "You are welcome to the 300*l.* But then you will remember to be punctual: as you know I have no money arising from the sales but what is resettled."

Three letters, written by Mr. Pyott to different persons, were proved on behalf of the defendant Sir Robert Johnson Eden. The first was dated the 23d of March, 1794, and in it he alluded to the Northbourne and York estates, and mentioned them as a part of his settled property. The second of these letters was dated the 15th March, 1795, and contained the following passage: "I have now resolved to have no more money laid out on mortgage or land, but the York and yours: what surplus there may be, I will venture in the stocks." The third was dated the 27th of June, 1798, and contained directions for preserving the mortgage-deeds from fire. The last was dated the 26th of July, 1796, and was partly as follows: "Stoneheap Farm appears a pretty dear purchase. However, I am satisfied."

On behalf of the residuary legatees under Mrs. Pyott's will, was proved a letter from that lady to Mr. George Ellin, on a mortgage of whose estate the 8,900*l.*, one of the sums arisen from the sales, was secured. It [\*115] \*was dated Canterbury, 30th December, 1814, and was as follows:

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"Sir, in compliance with your letter of the 15th instant, I have to acknowledge the receipt of the two last half years' interest remitted to me by Messrs. Raper, Swan & Co. In regard to the sale of the one lot of land, sold by auction, I am not desirous of receiving the 725*l*. But should you, at any future time, dispose of a larger proportion, I will thank you to give me due notice, that I may determine on what arrangement to make concerning the mortgage I hold. With respect to any legal concurrence, you will address your application to my solicitor, Charles Sandys, Esq. of this city. I remain," &c.

The suit was instituted by William Hougham and Richard Frend, the acting trustees and executors of Mrs. Pyott's will, against the devisees and the residuary legatees under that will, and also against Sir Robert Johnson Eden, as the heir at law of Mr. Pyott, Mr. Morton John Davison, as one of that gentleman's co-heirs in Gavelkind, William Walton, esquire, the representative of Peter Johnson and Dorothea Johnson his executrix, and also against George Carter, esquire, the other executor and trustee of Mrs. Pyott's will, but who had refused to act. The object of the suit was to have the rights and interests of the four first-mentioned classes of defendants to and in the 8,900*l*. and the other sums arisen from the sales of the settled estates remaining undisposed of, ascertained and declared by the court.

The master was directed, by the decree made on the hearing of the cause, to make the following inquiries : first, whether any such deed-poll as, in the instrument \*of the 14th of April, 1761, was stated to have been [\*116] dated on the 20th of June, 1760, was made and executed ; and, if the master should find that any such deed-poll was made and executed, then he was to state the purport and effect of it, and how it was executed and attested : 2d, who, at Mr. Pyott's death, would have been his heir at law of the property in question, assuming it, for the purpose of the inquiry only, to have been his property : 3d, what sales had been made of the trust estates, and when, and to whom, and at what prices ; and how the produce of such sales had been, from time to time, invested or applied ; and of what the same consisted at the deaths of Mr. and Mrs. Pyott, with liberty to the master to state any special circumstances as to the dealing of the several parties, with respect to the produce of such sales, either in the lifetime or since the death of Mr. Pyott.

The facts found, by the master, in obedience to this decree, are embodied in the preceding part of this report. The master's report omitted to state how the execution of the deed-poll of April, 1761, was attested. The fact was that the sealing and delivery of it only, and not the signing, were noticed in the attestation.

The cause now came on to be heard for further directions. The questions were : whether the 8,900*l*. and the other proceeds of the sales remaining undisposed of, were to be considered as part of Mrs. Pyott's personal estate, or whether they were to be considered as real estate, and if they were, whether they passed by the devise contained in Mrs. Pyott's will, or whether \*under the deed-poll of April, 1761, Sir Robert Johnson Eden was [\*117]

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exclusively entitled to them as Mr. Pyott's heir at law, or whether Mr. Davison, as one of the co-heirs in Gavelkind of Mr. Pyott, was entitled to share, equally with Sir Robert Johnson Eden, the other co-heir, in the proceeds of such parts of the estates as were situate in Kent.

Mr. *Boteler* appeared for the plaintiffs, the two acting executors and trustees of Mrs. Pyott's will, but did not argue any of the questions.

Mr. *Spence* and Mr. *Knight*, for Mrs. Pyott's residuary legatees :—First, in respect to Sir Robert Johnson Eden's claim : that arises under the deed-poll of April, 1761. By the settlement, the appointment was to be under the hand and seal of Mrs. Pyott, and to be attested by two witnesses. Now, the signature of Mrs. Pyott is not attested, and, consequently, that power was not duly executed, unless it was rendered valid by 54 Geo. 3, c. 168. But, taking all the circumstances of this case into consideration, especially those acts done by Mrs. Pyott, in the interval between the execution of the power and the passing of that statute, which are irreconcilable with the supposition that the appointment was a good one, the defect is not cured by the statute.

Down to the year 1814, when this statute was made, this deed, according to the decisions in *Wright v. Wakeford*,<sup>(a)</sup> and *Doe v. Peach*,<sup>(b)</sup> was [\*118] not a good execution of the power. Whilst the execution remained void, Mrs. Pyott made, what is, within the terms of the act, an entry or claim, which was so perfectly inconsistent with that appointment, that it must be considered as defeating it. She received and disposed of a very large proportion of the moneys for which the settled estates were sold, and, thereby, treated them as her own. She had no more right to receive that part, than she had to receive the remainder ; and therefore, this being, at the time, a void appointment, she has prevented it from being made good by this act of parliament. The deed-poll was in her possession. It was found with some title-deeds of property to which it did not, in the least degree, belong.

[The Vice-Chancellor :—She was executrix to her husband.]

Mrs. Pyott did not actually cancel this document, because it was in a place where she could hardly expect to find it. This is therefore a case within the proviso of the act ; “ That this act shall not extend, nor be construed to extend, to revive or give effect to any appointment, revocation or other assurance heretofore made, as far as the same has been avoided by entry or claim.” Consequently the appointment is good for nothing, and Sir Robert Johnson Eden's claim is totally out of the question.

Next, as to the claim made by the devisees. Mrs. Pyott not only had the power of appointment, but the property, the subject of the power, was absolutely hers in default of appointment.

[\*119] Now, was this real or personal estate in Mrs. Pyott ? In order to show what she considered the nature of the property to be, her acts and dealings may be admitted in evidence. *Hinchcliffe v. Hinchcliffe*,<sup>(c)</sup> the

(a) 4 Taunt. 213.

(b) 2 M. & S. 576.

(c) 3 Ves. 516.

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case on the Bishop of Peterborough's will; where evidence was admitted to show what he considered to be his property at the time he made his will, with a view to a case of election under the will; and that was not decided by the words of the will solely, but by those words aided by extrinsic evidence. *Druce v. Denison*,<sup>(d)</sup> is an authority to the same effect. If extrinsic acts would be evidence for the purpose of giving effect to a will, with reference to a question of election, are they not equally evidence, for the same purpose, with reference to the question, in what state the testatrix considered her property to be. Admitting it to be settled that property is not to be taken as it was found at the death of the owner, but that it ought to be considered as realty, though it is, in fact, personalty, or personalty, though it is, in fact, realty, notwithstanding an absolute interest be vested in the party, still some acts may be given in evidence to prove that the party intended that the property should remain as it was, and not as it ought to have been. If any such act, done by a person who has the absolute ownership, is proved; the right to convert that personalty into realty, or that realty into personalty, is gone as between the representatives of that person. *Ashby v. Palmer*.<sup>(e)</sup> Now, what are the acts of this testatrix? She has done all those acts which, for another purpose, have been brought under the consideration of the court, namely, dealt with this property as personal and as her \*own. She called in stock which, as will be argued on the other side, was outstanding for the purpose of being invested in real estates, invested it in her own name, and sold it out from time to time: she called in a sum due upon a mortgage, and invested it upon a bond. These acts of the testatrix, though applying only to a particular portion of the property, showed her intention, as to the whole, that the property should be personalty and in her own power. And it is material to recollect that the trustee obeyed her directions, and did not suggest that any trust was reposed in him, which could prevent her from dealing with the property at her pleasure.

Unless the property in dispute passes, there will be a part of the will which will be wholly inoperative. The decision in *Standen v. Standen*,<sup>(f)</sup> (which was affirmed in the house of lords,) is an authority upon this point. In that case the words were: "whether real or personal;" here they are: "whether in my own name, or in the name of any person or persons in trust for me." The court, in the case of *Standen v. Standen*, thought that both the alternatives of the will must be satisfied; and so, here, both the alternatives of this will must be satisfied, which they cannot be unless this property passes; as the testatrix had no other in the name of any trustee in trust for her. The testatrix also devises, specifically, certain real estates: and, if the court does not hold that this property is personal estate, it is undisposed of altogether; for she had estates to which the expression: "all other my real estates" apply, namely, the cottages. Therefore, if this is not to be considered as passing

<sup>(d)</sup> 6 Ves. 385. See also *Pole v. Lord Somers*, *ibid.* 379.<sup>(e)</sup> 1 Mer. 296.<sup>(f)</sup> 2 Ves. J. 589, and 6 Bro. P. C. 193, *ed. Toml.*

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[\*121] under the \*residuary clause in the will, a clause which shows the utmost anxiety on the part of the testatrix, not to die intestate, there are no words in this case which can carry it to any body. As then there are words which show that the testatrix intended to devise all her estates, and all her property, and as this clearly was her property, it must pass, either under the clause in the will giving her real estate, or under that which gives her personal estate. It cannot, for the reasons before stated, pass under the devise of the real estate, and, therefore, must pass under the clause which disposes of the personal estate.

There is another circumstance that ought to be mentioned, which is, that Mrs. Pyott, at her death, had all the deeds, by which this property was secured, in her possession.

[Mr. *Horne* :—She was her husband's sole executrix, and was supposed to be his heir at law.]

Next: the settled estates had been wholly sold in Mr. Pyott's life-time. Now it is settled that, when an heir at law takes personal estate, because it has been impressed with the character of realty, he takes it as personal estate, and it does not remain as real estate in him. Mrs. Pyott was one of her husband's co-heirs in gavelkind; and, therefore, taking the appointment to be good, she would still, as one of the co-heirs, succeed to a portion of that property. The money arisen from that portion of the property, though she took it impressed with the character of real estate, would be personal estate in her, and therefore that, at all events, belongs to those who represent her personal estate.

[\*122] \*Mr. *Sugden* and Mr. *Bickersteth*, for the devisees under Mrs.

Pyott's will :—The deed poll of April, 1761, is not now an operative instrument. The property, having originally been real property, has retained its original character, and passes by the devise in the will.

The first objection to this deed poll, is that it is founded on the execution of a power of revocation, stated to have existed in a former instrument, of the contents of which every body is ignorant. The appointment must, therefore, fail, because it can only be sustained as a valid execution of the power, by showing that the requisites of the power were pursued. That has not been done. But, if it could be presumed that the requisites of the power had been complied with, this is not a case in which such a presumption could be admitted; because, notwithstanding the supposed execution of the power which gave the estate to the husband, he never claimed it, and never considered himself as entitled to any benefit under the appointment.

There are two other reasons, that appear on the face of the appointment itself, for holding it to be inoperative: 1st, that it is testamentary; 2dly, that it was not to operate unless the husband survived the wife, which event did not happen. It appears that this deed poll was intended to be a testamentary instrument, from the directions written as the foot of it, by Mrs. Pyott, as to her burial; and because it was not to operate at all until her death. It is

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quite clear that she did not mean to destroy her own power, to defeat her own estate, or to break in on her rights, except in the event of her death.

But, if this instrument is not testamentary, \*no interest is to be taken [\*123] under it, except in the event of the husband surviving the wife, which did not happen. But, if these objections do not prevail, then we contend that this appointment has been waived, by a long course of dealing, or rather the dealings have been such as will let in a presumption, either of a revocation or of a release. The evidence for the devisees shows that Mr. Pyott never had the remotest suspicion that he had any interest whatever in this property. In a letter written by him on the subject of the property, on the 22d of September, 1793, he treats himself, simply, as tenant for life, and states that his family will never have any interest in this property.

Next, the appointment is wrong in point of form, because the signature is not attested; and no construction of the 54 Geo. 3, c. 168, can possibly be admitted which would go to revive, as a valid instrument, that which, by a long course of dealing, for half a century previously, had been treated and intended, by all parties, to be an inoperative instrument. That was not the intention of the act. The intention of the act was that, if there was a title that had been acted upon as good, under any appointment, then the informal execution of the power should not be a blot on the title. The legal or equitable means, by which this appointment has been avoided, are the acknowledgments, of all parties, that it was void. The husband, who was interested under that appointment, never once lays the least claim to the property. He writes letters which are the most decisive evidence that he did not consider himself entitled to it. He makes no disposition of it by act *inter vivos*, or by his will. The master's report shows a long course of dealing, by the sale of \*the estates and declarations of trust, in which no pretence [\*124] of right is even set up, on the part of the husband; and, in the directions for investing the moneys produced by the sales, in the purchase of other estates to be settled, the parties refer to the old uses, and never to any new uses introduced by means of the power of appointment.

There is another ground on which it may be contended that this appointment is at an end, namely, that Mrs. Pyott had a power to revoke by either deed or will. Now her will cannot be satisfied except by bringing in to its operation the very property in question: therefore, by devising property which is necessary to give effect to the words of her will, that will operated as a revocation and new appointment.

The next consideration is, whether there was a conversion of this property from real into personal estate?

The power of sale in this settlement is a conditional power, and is much stricter than the common power of sale and exchange, used in modern times. This is a power to sell and exchange, so that, in case of a sale, the moneys arising by sale should be invested in the purchase of other estates, and that then, and in such case, the estates limited by the original instrument shall cease



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and determine. The limitations of the original estate do not cease and determine until the moneys produced by the sale are re-invested in the purchase of other lands, and all those lands are resettled to the old uses. *Doe v. Martin*; (g) *Burgoigne v. Fox*. (h) As these uses were never to be defeated, except by introducing other estates, \*subject to the limitations of the settlement, the intention of the parties to this settlement was that the property settled, or that which should come in lieu of it, never should lose the impression which had been put on it of the character of real estate, until some person who had the absolute estate in fee simple, chose at once to put an end to it, and convert it into personalty. It is impossible that any state of circumstances could exist which, in such a case, could enable parties to change the character which that property had acquired by the settlement; the object of those parties being, during the whole continuance of the uses of that settlement, to keep the property subject to those uses, whether it was the old or the substituted property, impressed with the character of real estate. Now what were the acts done with a view to change this character? Every one of the acts of these parties, so far from showing that it was their intention that there should be a change of character, would have themselves changed the character if even it had been money, whereas it is impressed with the character of real estate; and it is for the other side to show that it has lost that original character, and has been converted into personalty. In all the conveyances to the purchasers, except one, there is a recital that it was the intention of the parties to re-invest the money in the purchase of other lands, pursuant to the directions of the settlement. What stronger declaration than this could be made, that the original character should continue? So far from there being an attempt at a conversion, there is the most express declaration by the parties, that the money shall continue as personal estate until it could be re-invested in land, and no longer. Then what was done with the moneys? They [\*126] \*were all invested in securities, in the name of a trustee, for the express purpose of being re-invested, according to the directions of the settlement. Those recitals were inserted, in the different conveyances to the purchasers, for their security and indemnity, and to fix the trustees so that they could never depart from the trust which they had to execute. The purchasers knew that, unless the property was retained as realty, they never could have a title. Can it be allowed, therefore, that, by construction, the court should be asked to hold that the trustees have committed a breach of trust, the effect of which would be to defeat that very title which they themselves professed to make? A court of justice was never called on to make a stronger presumption against all propriety. Upon this point the deed of the 14th of January, 1796, is of great importance: it not only proves that Mr. Pyott, himself, set up no claim to this property, but considered the original uses of the settlement as existing uses. It also proves, to demonstration, the intention to keep the character of real estate impressed on the property.

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The testatrix, at the time of making her will (without regard to the fund which is the subject of discussion) had, in the language of her will, securities for money, and money in the public stocks or funds. Under these circumstances she addresses herself to the duty of making her will. On the face of it we find a devise of real estate, and a bequest of personal estate; and the only question is under which the property in dispute is to pass. The devise of her capital messuage or mansion house, and the buildings, gardens, grounds and appurtenances to the same belonging or therewith used, would pass the whole of the \*property in Saint Martin's parish, including the [\*127] cottages. *Doe v. Collins.*(i) But if that devise does not include the cottages, they will pass by the words: "and all and singular other my messuages, lands, tenements and hereditaments, and parts and shares of any messuages, lands, tenements or hereditaments." Then follow these words: "and all other my real and leasehold estates whatsoever and wheresoever." There must then be something still left for those other words to operate upon. What can pass by them but the money impressed with the character of real estate, which was, to all intents and purposes, real estate? In another part of the will we shall find, not only the limitations, which show that she had a considerable estate in her view, but also a power of leasing, which it is impossible for any body to read without being satisfied that she meant considerable property to be acted on by her will. The words that occur in this power of leasing, are never used, unless the subject intended to be demised is land, in its common acceptation, and not a mere messuage. The whole form of the will is decisive of her intention to give a considerable property as real estate, in short, to give every thing that had the character of real estate, or was impressed with that character; and she has expressed that intention in too unambiguous a manner to admit of doubt. Then comes the gift of the personal estate, under which it is insisted that this property passes.

The first observation that arises on this part of the will, is that there is no property here given, but what the testatrix had property to answer, independent of that in dispute. The words: "and whether such property \*be vested, or standing in my own name, or in the name of any person [\*128] or persons in trust for me, or for my use or benefit," are general words, and do not designate any property standing in the name of other persons as trustees, but show that she meant to give all her personal estate, whether in her own name, or in the name of any person as trustee for her. As late as 1804, there had been a fund of trust money standing in the name of a trustee for her, and which she afterwards received. She might suppose that there was other trust money that was still outstanding. It is impossible she could mean to include, under such words as these, that which was worthy of being put forward as a substantive subject of gift, that the parties might know what she was so liberally bestowing upon them. Besides, the testatrix expressly

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refers to the parts and shares of different estates ; and those words seem to be used for the express purpose of pointing out the particular source from which these funds arose.

It has been argued that, because some portion of the moneys was afterwards withdrawn from the trusts on which they were placed, and disposed of by Mrs. Pyott at her own pleasure, and by that means converted from land into personalty, therefore, the whole must be considered to be so converted. that is an argument which is without any foundation at all ; and, if it had any effect, it must tend to show that what she did not do with respect to the other funds, she never intended should be done at all.

The decision of the house of lords in *Standen v. Standen*,<sup>(k)</sup> was [\*129] expressly confined to the real estate ; \*and, whenever that case is cited, it is alwas confined, as an authority, to the real estate : it, therefore, is a decision which supports the claim of our clients. Not only are the facts, as they appear by the deeds, all in favor of the devisees, but, down to 1804, this lady was a married woman, and, therefore, until that time she could do no act to convert the property from real into personal estate. *Rashley v. Masters* ;<sup>(l)</sup> *Kirkman v. Miles* ;<sup>(m)</sup> *Biddulph v. Biddulph* ;<sup>(n)</sup> and *Wheldale v. Portridge*,<sup>(o)</sup> are authorities in favor of the devisees' claim.

Mr. *Horne*, Mr. *Pepys* and Mr. *Turner*, for Sir R. J. Eden :—A portion of the settled estates, not distinguished, by any thing in the settlement, from the rest, consisted of land of gavelkind tenure. There was one general power of selling and exchanging in the settlement, without reference to the peculiar tenures of the property ; and the question, upon this part of the case, is, what is the character of the money produced by the sale of those gavelkind lands ? Nobody will deny that, from the moment when that gavelkind land was sold, and therefore became entirely out of the settlement, the parties had nothing to do with that land, but only with the money produced by its sale ; and the settlement declares, generally, that the money produced by the sale of the real estates originally in the settlement, shall be re-invested in the purchase of real estate, not that the proceeds of the gavelkind land, shall be re-invested [\*130] in other lands of gavelkind \*tenure, or the proceeds of the land of common law descent, be invested in lands of common law descent. It is, therefore, impressed, till it is laid out, with the character of real estate : and the question is, whether it is impressed with the charcter of that real estate of which it was the produce. Now, when we say it is money impressed with the character of real estate, it is not because it is money produced by the sale of real estates, but because the settlement declares that it shall be laid out in land. It is impressed, therefore, with the character of real estate, not with reference to the lands sold, but with reference to the lands to be purchased. If the lands to be purchased were to have been gavelkind lands, there ought to have been

(k) 6 Bro. P. C. 193.  
(n) 12 Ves. 161.

(l) 1 Ves. J. 201.  
(o) 8 Ves. 227.

(m) 13 Ves. J. 338.

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a declaration in the settlement to that effect, because that is an exception from the general law of England with respect to tenure ; and, there being no such direction, the legal inference is that the lands to be purchased, are lands of common law inheritance.

It is clear, from the evidence, that the deed poll of 1760, must have been destroyed in Mrs. Pyott's life-time.

If there was any informality in the attestation of the deed-poll, the defect is remedied by the 54 G. 3, c. 168. The dealing with the property, which it has been contended had the effect of an entry or claim, took place in consequence of the mistaken notion, then entertained, that Mrs. Pyott was her husband's heir ; and, therefore there was no person, as she thought, with whom she could contest the appointment. Mrs. Pyott did not destroy the deed poll of 1761, but preserved it.

\*That deed poll was not testamentary, either in form or in substance. [\*131] It reserved a power of revocation, which would have been unnecessary, if it had been a testamentary instrument ; and it operated from the time of its execution, by giving an interest vested in *presenti*, to commence in enjoyment, in *futuro*. Nor was the appointment intended to operate in the event only of Mr. Pyott surviving his wife : for it extends to the children of the marriage and to Mr. Pyott's heirs.

The will, neither by expression nor inference, shows an intention to revoke the deed poll. It contains no disposition of the disputed property. The cottages satisfy the residuary devise. *Doe v. Collins*, does not apply, for the cottages were not occupied with the mansion house, but were let to different tenants. If Mrs. Pyott had intended to revoke the appointment, she might have done it in two lines.

Then it is said that a release is to be presumed. Now, Mr. Pyott, in his letter of September, 1793, speaks of his life estate in the property, which he could not have had except under the deed poll : and, in his letters which have been proved, he treats the property as his own, as that on which he intends to spend the remainder of his days, and seems most anxious to preserve the title deeds relating to it. The expression in one of those letters, "as the estate will not go to my family," is a mere loose expression used to a stranger, and meant nothing. The property must have gone to his heir, either by the appointment, or without it, as the same individual was the heir of both the husband and the wife. At the time the deed of covenant of January, 1796, was executed, there was no probability \*of Mrs. Pyott having [\*132] children ; but the parties seem anxious to preserve the trusts and powers of the settlement. This could be for no other purpose, than to preserve the interests of those who claimed under the appointment. Why were the large sums now in dispute, suffered to continue in the hands of trustees, if the appointment was revoked or released, and those sums had become the absolute property of Mrs. Pyott ? The letter from Mrs. Pyott to Mr. Ellin, was written to a stranger who had nothing to do with the settlement. She was the visible

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owner of the property. And that letter affords evidence for us ; for in it she declines to receive the 725*l.*, and shows, by the reference to her solicitor, that she knew the money, if paid in, was to be re-invested in a particular mode, and in the name of trustees, and not to be paid to her or her bankers. *Jones v. Tucker* ; (n) *Jones v. Curry* ; (o) *Lewis v. Lewellyn* ; (p) *Lingen v. Sowray*. (q)

Mr. *Simons*, for Mr. Davison, one of the co-heirs in gavelkind, said that it would be inequitable to hold that the heir at common law was entitled to the whole of the funds in dispute : that if a bill had been filed to have the property re-invested, the court, when it saw that the bulk of the property sold had been land in Kent, that the parties resided in that county, and that part of the money had been laid out on a mortgage there, would direct so much of the money as had arisen from the sale of the Kentish estates, to be re-[\*133] invested in land in that county ; and that, as part of the \*proceeds of the settled estates had been re-invested in the purchase of the other two-thirds of Stoneheap Farm, and as there was no power given by the settlement to re-sell those two-thirds, Mr. Davison was entitled together with Sir R. J. Eden, to two-thirds of the money arisen from the sale of that farm.

Mr. *Spence*, in reply :—The deed of 1796 operates most strongly in our favor ; for it appears by the recitals of it, that Mr. and Mrs. Pyott had received the whole of the purchase moneys ; which plainly shows that they considered that they had the whole control over those moneys. That deed was executed for the indemnity of the trustees merely, and does not show any anxiety, on the part of Mr. and Mrs. Pyott, that the moneys should be considered as moneys to be laid out in land. The mortgage-deeds were found in Mrs. Pyott's possession at her decease. That shows that she was considered to be the absolute owner of the moneys, and that it was no longer thought necessary that these moneys should be re-invested in the purchase of land. Under the word "appurtenances," in the residuary devise, the cottages cannot pass ; for they are divided from the mansion-house by a turnpike road, and were not occupied with the house. They passed under the words : "and all other my real estates," &c. ; there is, therefore, property to answer those words.

The leasing power refers to the mansion house, gardens and appurtenances only, and supports our claim. The anxiety which the testatrix displays about her property at St. Martin's hill, shows that she considered it to be [\*134] the most valuable part of her real property. \**Lingen v. Sowray*, (r) is distinguishable from this case. For there the wife had an estate for life intervening between the life estate and the reversion in the husband, so that he had not the entire interest in the property ; and, besides, there were some securities upon which the will could operate ; but here the will cannot be answered, without including in it the funds in dispute. That case, therefore, becomes an authority for us ; for, if there had not been any securities ex-

(n) 2 Mer. 533.

(o) 1 Swans. 66.

(p) 1 Turn. &amp; Ross.

(q) 1 P. &amp; W. 172. S. C. Prec. Chan. 400.

(r) 1 P. W. 172. S. C. Prec. Chan. 400.

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cept those in question, in that case, the court would have come to a different conclusion. Here too money in the funds, and securities for money, whether in the name of trustees or of the testatrix, are specifically bequeathed, and are charged by the testatrix with legacies to a very large amount, which shows that she expected that the funds so charged would be of a sufficient amount to pay the legacies ; which will not be the case if the construction which the devisees contend for, is to prevail ; and, if it does prevail, this part of the will will be useless, because there will be nothing to answer it. In *Rashley v. Masters*,<sup>(s)</sup> the question in the present case did not arise, as the dispute was between the heir and devisee, and there was no pretence for saying that the 5000*l.* passed as personal property. In *Biddulph v. Biddulph*,<sup>(t)</sup> there was an absence of all intention ; and there were funds to answer either description of property. *Kirkman v. Miles*<sup>(u)</sup> is a strong case in our favor ; for, in that case, the court held that a presumption of conversion did not arise on a possession for so short a period as two years. But here is a possession of the mortgages, as mortgages, \*from 1795 down to 1816, the year of Mrs. Pyott's death. [\*135] If, in the cited case, there had been as long a possession as there is in this, the court would have come to a different conclusion. *Wheldale v. Part-ridge*<sup>(x)</sup> is also I submit an authority for us, because it decides that the property must be taken as it is found at the death. Mrs. Pyott, in her letter written in 1814, says "the mortgage I hold," and, therefore, treats it as her personal estate. We therefore contend that the property in question was converted, out and out, into personal estate ; but if it was not, we claim it under the specific words of the residuary clause ; for otherwise there will be no property to satisfy those words, there being, at Mrs. Pyott's death, no property standing in the name of any person in trust for her, except the funds in this cause. *Standen v. Standen*.<sup>(y)</sup>

The VICE-CHANCELLOR, after stating the contents of the master's report, proceeded thus :—The claims that have been made to the funds, the subject of this suit, are three. First of all, Sir Robert Johnson Eden, who is found by the master, to have been the heir at law of Mr. Pyott, claims, in that character the sums of 8900*l.*, 1000*l.* and 1500*l.*, which were derived from the sale of the settled estates ; he claims them by virtue of an appointment, the terms of which I shall shortly have to allude to, which was made in the year 1761, by Mrs. Pyott. A claim is also made to the same sums, by those who are the devisees under Mrs. Pyott's will, of her real estate, in words on which I shall also have to comment ; and a claim is also made to the same sums, by the persons who claim under the residuary bequest in Mrs. Pyott's will.

\*The first question then is, whether, under the appointment which was [\*136] made in the year 1761, the heir of Mr. Pyott can claim ? [His Honor here stated the contents of the deed poll.] The first objection that is made to

(s) 1 Ves. J. 201.

(t) 5 Ves. 388, and 8, 227.

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(u) 12 Ves. 161.

(y) 2 Ves. J. 569.

(x) 13 Ves. 338.

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the validity of this appointment of the 14th April, 1761, is that it appears that, before it was executed, there was some other appointment made by a deed poll of the 20th of June, 1760 ; and it is said that, because it does not appear what has become of that deed poll, and because it is impossible, if it does not appear, to be quite sure that that deed poll itself has been revoked by the appointment of the 14th of April, 1761, and because it might happen that, if it was not revoked, the limitations contained in it would be utterly inconsistent with the limitations contained in the instrument of the 14th of April, 1761, therefore, the instrument of the 14th of April, 1761, cannot be considered as a valid appointment. It appears to me that there is no foundation for that objection. Here we have an instrument under hand and seal, solemnly made, expressly recognizing the instrument of June preceding, and formed for the express purpose of revoking that instrument, and making new limitations apparently inconsistent with it ; and I apprehend that the very fact which comes out in evidence, namely, that this instrument of the 14th of April, 1761, has been preserved, and was found with the title deeds relating to the estates of Mrs. Pyott contrasted with the fact that the deed poll which was intended to be rendered null and inoperative by means of the instrument of the 14th April, 1761, is nowhere to be found, is a strong circumstance to fortify the presumption that the instrument of the June preceding was made null and inoperative, and was destroyed because it had been made null and inoperative, and, therefore, of no [\*137] value. \*The instrument, which was intended to be an operative instrument, is preserved. The instrument which was intended not to be operative, and to be null, has not been preserved ; and I am asked, when I find something so clear and explicit as the intention of the party, declared by the existing and forthcoming instrument of the 14th April, 1761, to pay no regard to it whatever, and to consider it as altogether inoperative, because a conjecture is made that the power of revocation reserved in the deed of the June preceding, was not duly executed by this instrument of the 14th April, 1761, deliberately made for the purpose of revoking it. My opinion is, that I am bound to act, and must feel my judgment concluded by that which is plain and explicit, and that I cannot allow this instrument, which apparently is a perfect and valid instrument, to be set aside and overruled by a conjecture as to the contents of that deed, which cannot be produced.

Then it is said, with respect to the nature of this instrument of the 14th April, 1661, that it is to be considered as altogether a testamentary instrument, and not merely so, but that it is to be considered as an instrument which was never intended to take any effect at all, except in the event of Mr. Pyott surviving Mrs. Pyott ; and, if that was a right construction, then there would be an end of the question, as far as it is raised by the instrument of the 14th April, 1761. Now it is perfectly true that this instrument does appoint a life estate to Mr. Pyott, in the event of his surviving his wife. He could, by the terms of the settlement, take an interest for his life no otherwise than by her appointment ; and, as she, by the limitations of the settlement, took the life

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estate in possession, he could take a life estate in remainder only ; \*and, therefore, I find that, when she has appointed the life estate to [\*138] him, to take effect immediately after her death, she has intended to execute the power which was given to her, to appoint the life estate to him after her death. But it is quite clear that, for the purpose of enabling him to take that life estate, he must survive her. But the instrument goes further ; because she says, from and immediately after her death, in case she should leave any child or children by her husband living at the time of her death, to her husband for his natural life ; and, after the decease of her husband, she appointed the premises to the child or children which she should leave, by her said husband, living at the time of her death ; but, if she should leave no children, by her husband, living at the time of her death, then, from and immediately after her death, she appointed the same premises unto the use of her husband, his heirs and assigns for ever ; which, in the particular contingency which, in fact, did happen, of her leaving no child or children, by her husband, living at the time of her death, was an immediate appointment, to take effect from the execution of the instrument, of the fee simple to the husband : and, supposing that she had not made the appointment to depend upon the fact of her not leaving children living at her death, there is no doubt that, under this instrument the husband would, on the mere execution of it, have had in himself a vested estate in reversion : but, inasmuch as the estate appointed to him, is made to depend on the contingency of her not leaving children living at her death, the only difference is that, immediately upon the execution of the instrument, he had an absolute right to the estate in reversion ; provided, only, that future contingency happened, by means of which the reversion would take effect in possession. It \*appears to me, therefore, that this is an instrument which, with respect to the reversion, had an immediate [\*139] effect from the time of its execution.

Then a question arises, what effect the will has had upon this instrument. Before I go to that, however, I must allude to another point, namely, the question whether this instrument can be considered a valid instrument with regard to the form of the attestation. The power given by the settlement was a power to appoint by any writing or writings under her hand and seal, attested by two or more credible witnesses, or by her last will and testament, or any writing purporting to be her last will and testament, to be by her signed and published in the presence of three or more credible witnesses. The first observation that arises upon this, is that the power which was executed, or which was intended to be executed, by the instrument of the 14th April, 1761, was not the power which was given in the settlement, but was the power, whatever that power was, which was contained in the instrument of the June preceding ; and it by no means follows, as a matter of course, that, when this lady had once executed her power of appointment by the instrument of June, 1760, she reserved the power of revocation and new appointing, precisely in the same words as were expressed in the settlement, which authorized the



1824.—*Collins v. Macpherson.*

appointment made by the instrument of June.(y) And, if any presumption was to be entertained, it would be presumed rather that this instrument, [\*140] which professes to be an execution of the power of revocation \*contained in the instrument of June preceding, was an instrument which executed the power reserved by the instrument of June preceding, in the manner in which that power was reserved; and it is a gratuitous assumption that has been taken in the course of the argument, that it is to be taken that the power to be executed was the power that is contained in the settlement. But it is observable that this lady, by the very instrument which she executed in April, 1761, has reserved to herself a power of revocation which in a great degree tallies with the power which was reserved in the settlement; and I think, therefore, that the fairest and the most satisfactory mode of considering the case would be upon the supposition that the power which was contained in the instrument of June, preceding, was a power of revocation corresponding with the power that was contained in the settlement. On that supposition then the case should be considered. If it were so, why then the power was to be executed by a writing under her hand and seal, attested by two or more credible witnesses. Now the instrument that is produced, is an instrument which appears to be signed by Ann Pyott, which has her seal, and which has an attestation in these words: "sealed and delivered in the presence of," &c. Now the statute that has been alluded to was passed in consequence of the cases of *Wright v. Wakeford*, and *Doe v. Peach*. Before that case of *Wright v. Wakeford* was decided, the case of *Macqueen v. Farquhar*(z) had occurred; and there a power had been reserved to a person, by any deed or deeds, writing or writings, to be by him signed and sealed in the presence of two or more witnesses, to appoint; and the deed, which was intended [\*141] to be \*executed in pursuance of the power, was a deed, expressed, in the body, to be signed, sealed and executed in the presence of three credible witnesses. Now the witnesses who attested that deed, are stated in the indorsement of attestation on the deed, to attest the sealing and delivery only; and the question was, whether that was sufficient; for the instrument was to be signed and sealed in the presence of two witnesses, and the attestation expressed that the witnesses attested the sealing and delivery only; and Lord Eldon says: "the fact, in all probability, is that the person who prepared the attestation indorsed the ordinary words, not attending to the circumstance that the party was doing the act by this deed purporting to be signed, sealed and executed in the presence of the witnesses. Upon the question whether, after execution, it ought to be taken that he did sign in the presence of the witnesses attesting the sealing and delivery, there would be a miscarriage in a judge directing the jury, if that fact was found, not to presume that the deed was signed in the presence of the same witnesses as it professed to be. The

(y) The appointment made by the deed poll of April, 1761, purports to be an execution of the power reserved by the settlement.

(z) 11 Ves. 467.

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attestation, therefore, is good." It is to be observed that there were no directions, in the instrument which reserved the power, as to any attestation at all; but it was only directed that the instrument should be signed and sealed in the presence of two or more witnesses. After that case, came the case of *Wright v. Wakeford*; there the power was given, to be executed with the consent of certain persons, testified by writing under their hands and seals; attested by two or more credible witnesses and the instrument which professed to be made in execution of the power, appeared, on the face of it, to be signed and sealed and delivered; but the attestation on the deed, which was made at the time of the sealing \*and delivering of the deed, was [\*142] an attestation to the facts of the sealing and delivery only: and when the case came before Lord Chancellor Eldon, he discussed it, and evidently was of opinion that the attestation was not sufficient, because, according to his opinion, the proper meaning of the term "attest," was that the witnesses should, by the written attestation, give their evidence to the fact that the instrument was signed, as well as sealed and delivered: and, although there could be no doubt, after what Lord Eldon had said in the case of *Macqueen v. Farquhar*, if that rigid construction had not been put on the word "attest," and it had been left to any jury to determine the fact, whether the instrument was signed, as well as sealed and delivered, they would, without doubt, have held, or been directed by a judge to hold that it was signed, as well as sealed and delivered: yet Lord Eldon, putting that severe construction on the term "attest," held that the attestation was insufficient. But he sent it to the court of common pleas; and, when the case was argued in that court, three of the judges certified that the attestation was bad, and that there was not a due execution of the power. Mansfield, C. J., who had for many years practised in a court of equity, and who was a very competent master both of law as well as of equity, stated that, in his opinion, the instrument was perfectly good. Then came the case of *Doe v. Peach*. In that case there was a power, by any deed or writing, deeds or writings, under the hands and seals of both parties, to be by them duly executed in the presence of, and to be attested by two or more credible witnesses. The attestation to the execution of the deed which professed to be an execution of the power, related to the sealing and delivery of it only. On the trial of an ejectment, a case \*was reserved, and Lord Ellenborough, after the discussion of the [\*143] case, held, and the court of king's bench concurred with him, that the attestation was not good, that it ought to have gone to the fact of signature, as well as of the sealing and delivery. That being the state of the law, the 54th of the late king, C. 168, was passed. It is observable, on the face of that act, that it was intended to be a remedial act, for the purpose of obviating doubts which had arisen, and the act itself expresses that it is expedient that the titles of purchasers and other persons should not be disturbed. Now, by "purchasers" are meant here, as I conceive, persons who purchased by paying a valuable consideration, and the words, "other persons," mean all other persons,

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volunteers or others, who may be interested in such instruments; and it is more likely that that was the construction, because this question as often arises in the case of voluntary appointments, under family settlements, and merely family instruments as under instruments by means of which a purchaser for a valuable consideration is to derive a title. It appears to me, therefore, that volunteers were meant to be protected by this statute as completely as purchasers for a valuable consideration. In the second section, there is a certain class of instruments pointed out with respect to which the act shall not have reference. The third section has this proviso: "that this act shall not extend, &c." The terms, "entry or claim," were, I presume, meant to apply to the case of a legal entry, and of a legal claim. The terms, "suit at law or in equity," explain themselves. Last of all come these general words: "or by any other legal or equitable means whatsoever." And, without doubt, there might be legal means, and certainly there might be equitable means [\*144] which would have the effect of avoiding \*an instrument which was defective in regard to the attestation. We therefore have to consider whether, in this case, there have been any other legal or equitable means (for entry there could not be, and claim there was none, nor was there either a suit at law or in equity) by which the instrument has been avoided. Avoidance of the instrument for the purpose of making it null, is quite a different thing from so dealing with the fund, of a portion of the fund, which is the subject of the instrument, as to withdraw it from the operation of the instrument, because the instrument would have remained perfectly valid if a portion of the fund had been altogether withdrawn from it by the acts of strangers. Supposing that the lands in the settlement had not been sold, and the title of the settlors had been bad as to a portion of those lands, and they had been evicted, without doubt that would have avoided the instrument in a sense, for it would have withdrawn part of the estate on which the instrument was to operate; yet the operation of the instrument would have remained unaffected as to the remainder.

It appears, by the master's report, that the estates were sold in 1773, as to part, and, in 1795 and 1796, as to the remainder; and that, so late as the year 1800, an instrument was executed which expressly recognized the existence of the settlement, so far as the fund mentioned in that instrument was concerned. It appears that, in the deed of January, 1796, there was, in the strongest manner, a recognition of the existence of the settlement; and the same thing appears with respect to the instrument of 1773. I consider what appears on the face of these sealed instruments, speaking language which has no ambiguity, and which the parties were bound to speak, or at least ex-pressing sentiments \*which they were bound to entertain, as of far greater importance than any loose expressions that may be found in any letters that have been written either by Mr. Pyott or by Mrs. Pyott; and, supposing that the letters were more clear than they are, they would, in my mind, be outweighed, a thousand times, by the language of the deeds, especially when you

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advert to this circumstance, that the power of sale was so constructed (for I go entirely along with Mr. Sugden's argument on that point,) as that the legal estate would not, under the mere execution of the power, vest in the purchaser, unless it had subsequently happened that the purchase money was laid out in the purchase of lands to be settled to the uses of the sold lands; I say, under the mere power itself; because it appears that that difficulty would not have arisen in respect to the purchaser; for the trustees of the settlement had got the legal estate in fee, therefore they could convey that, by their grant, exclusively of executing any power; but still, in order to make the purchase good in equity, the purchaser had an equity, as against the vendors, to say: "lay out the purchase money which we have paid to you in the purchase of lands, and settle it on the uses and trusts of the settlement." Then I find that these parties are, in the years 1773, 1796 and 1800, so dealing with each other, as to keep alive the necessity of complying with that duty which they owed to the persons who had paid them the purchase money. It is quite clear that, down to the year 1800 at least, both Mr. and Mrs. Pyott did recognize the settlement as affecting the lands which had been in the settlement, and the purchase moneys which had arisen from the sale of those lands. The language in the letters is ambiguous. The letter written by Mr. Pyott, which was most \*relied on, had this expression in it: "I have the least in- [\*146] terest in it, as my life is not worth ten years' purchase, and as the estate will not go to my family." That letter shows this only, that he was aware that the estate would come to him for his life, but that he was not aware of the fact that it would vest in him on a particular event happening. It proves, therefore, to a certain extent, that his memory was affected by the circumstance that the appointment had been made, giving the life estate to him, although his memory did not enable him to advert to the circumstance that he was to take the reversion in the estate: but, if I find that he is speaking of his life estate, I must suppose that he did, thereby, obscurely advert to the fact that there was a subsisting appointment which had given him a life estate; and it only comes to this, that he was not aware, at the time he wrote the letter, or at least did not summon to his mind, when he wrote that letter, a full recollection, of all the interest he might possibly derive under that appointment. Then there is a letter, written by Mrs. Pyott, in December, 1814. This letter states: "I will thank you to give me due notice, that I may determine what arrangement to make concerning the mortgage I hold;" and it is asked that, from an expression so completely loose and indefinite as that is, the court shall take it for granted that there was a deliberate purpose, on the part of Mrs. Pyott, to convert the money on mortgage, from the character of real estate (with which it then was impressed,) into the character of personalty. It appears to me that this affords far too slight a foundation for this court to act on.

There is another letter introduced, written by Mr. Pyott in May, 1795, in which he says; "You are \*welcome to the 300*l.* paid by [\*147]

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Faussett: but then you will remember to be punctual, as you know I have no moneys arising from the sale but what is resettled." Can this be considered as a recognition by Mr. Pyott, in the month of May, 1795, that the money which was out on mortgage was to be considered as personalty, as money not to be resettled? Is it any thing but a complete, direct recognition that there was a subsisting obligation to resettle that money which was then out on mortgage; and, therefore, without adverting to the other letters, which were read by Mr. Pepys, and which, more or less, went to show that Mr. Pyott did consider that he had himself an interest in the settled estate, which he never had except by means of the appointment, it is, in my mind, perfectly clear that, at the time when Mrs. Pyott made her will, and at the time when she died, the character which the money upon mortgage sustained, as being impressed with a trust to be laid out in the purchase of real estates to be settled to the uses of the settlement, which comprehended therefore whatever interest might be given by the appointment of April, 1761, did remain.

I now proceed to consider the next part of the case, and that is, whether, in the will, I can find any express words of revocation and new appointment, or any words which, by the most liberal construction that has ever been put upon them, have been or can be considered as revoking the appointment of April, 1761, and passing the money either as land or as money. It is observable that Mrs. Pyott has, at the end of her will, used these words: "Lastly, I do hereby revoke and make void," &c. Now have these words exercised the [\*148] power of revocation, and made void the appointment? \*It appears to me that they have not. They evidently cannot mean that she revokes all papers whatsoever, but the word "testamentary" must be taken as coupled with the word "papers" as well as "appointment." What she revoked, therefore, was all former wills, and also all testamentary appointments and papers. It is not, however, every instrument which passes an interest that that will not take effect in possession until the death of the party, that can be legitimately called a "testamentary instrument," or a "testamentary appointment," or a "testamentary paper." The deed and writing which was signed, sealed and delivered by Mrs. Pyott, professed to have its operation immediately. It immediately gave a life estate in the property to her husband, and immediately gave to him the whole fee simple, in the event of her dying without leaving children; and I cannot look at that instrument as bearing any testamentary character whatever. It was attempted to be said that the instrument must be considered as testamentary, because there is a memorandum at the bottom of it, in which Mrs. Pyott gives some particular directions about her funeral. But I cannot allow that memorandum to have any effect whatever on the instrument; because there is no evidence of the time when it was written, and therefore I cannot connect it with the appointment under which it is subscribed. It amounts then to no more than this: that, upon a paper which gives a very large estate to the husband, which, though it could not be enjoyed by him unless he survived his wife, gave him an interest which he was capable

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of parting with if he did not survive her, there is a direction concerning her funeral. That is much too weak to justify me in holding that it has converted the instrument itself into a testamentary paper. I consider, therefore, that by \*these words this lady has only expressed an intention to do [\*149] that which is generally done by persons making a will, namely, by express words to revoke all former instruments of the same nature, the production of which would militate with the intention expressed in the will in which those words are contained. Then it is to be observed that, if I find, in this will, an expressed intention to revoke all testamentary appointments, and find no expression of an intention to revoke appointments not testamentary, according to the rule, *expressio unius est exclusio alterius*, not only is the appointment not affected by it, but it leaves an inference that that appointment, which was not testamentary, was not intended to be revoked. When I come to the devise, I find that after giving certain legacies and annuities, this lady gives to Mr. Loop, or his assigns, a certain cottage; and then she says: "As to my capital messuage or mansion house, wherein I now live," &c. Now, adverting to what was the freehold property which this lady could devise, is this devise to be construed, of necessity, as a devise operating at once as a revocation of the power of appointment, and making either a new appointment, or passing that interest in fee simple, in equity, which the testatrix had, provided she did not choose to execute her power of appointment?

There is no doubt that, for the purpose of construing a will with regard to the question whether it is an execution of a power, courts are justified in regarding the nature of the real estate which the person making the will had at the time. In the case of *Standen v. Standen*, (which was affirmed in the house of lords,) there was a general devise in these terms: "All the rest, residue and remainder of my estate and effects, of \*what nature or kind [\*150] soever, and whether real or personal." And the question there was, whether a power could be considered as well executed by those general words, having regard to the situation of the testator's property. As to the real estate, it was held, first of all in the court of chancery, and afterwards by the house of lords, that the power was well executed; and the same doctrine is also to be found in the case of *Bennett v. Aburrow*,<sup>(a)</sup> and which I refer to for the sake only of the very clear language in which Sir William Grant has expressed his view of the doctrine. He says: "Formerly it was sometimes required that there should be an express reference to the power; but that is not necessary now. The intention may be collected from other circumstances, as that the will includes something the party had not otherwise than under the power of appointment; that a part of the will would be wholly inoperative, unless applied to the power." And that appears to be the correct and clear view of that part of the law. I must, therefore, consider this devise with a view to discover whether, for the purpose of giving effect to the particular, as well as the general

<sup>(a)</sup> 8 Ves. 609.

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words in it, this property, which remained impressed with the character of real estate, was of necessity included.

The lady, it appears, had her mansion house at St. Martin's Hill, with certain offices and gardens, and pieces of pasture ground and shrubbery. on one side of the road, and, on the other side of the road, there was a collection of cottages, and, in the space between two of the cottages, there was a circular plot of ground, which apparently was used for the convenience of turning [\*151] her carriage. I entirely concur \*with the decision that was made by the court of king's bench, in the case of *Doe v. Collins* : but, in this case, it appears that these cottages were on the side of the road opposite to the messuage, and that they were not occupied by the lady herself ; on the contrary, it appears they were occupied by other persons ; therefore, I cannot think that, under the words : " My capital messuage or mansion-house wherein I now live, and the buildings, gardens, grounds and appurtenances to the same belonging," the cottages on the opposite side of the road passed. Then follow the words " or therewith used," but they were not therewith used. Then come the words : " All and singular other my messuages, lands, tenements or hereditaments, and all other my real and leasehold estates whatsoever and where-soever." The fair construction to be put on these words, is that they only meant to pass all other her real estate, especially when it appears, upon the face of the will, that there was the reversion in fee of the cottage which had been devised to Mr. Loop for his life, and when it appears that there were other cottages, and the piece of land on the opposite side of the road to which these words may be applied. I think that these words are merely to be taken as general words : and, therefore, my opinion is that, under these words of devise, that equitable real estate, which was not hers at the time she made her will, but was her husband's, (for unless this is taken to be a revoking of the power, it was her husband's,) did not pass, and no intention can be collected from these words, of revoking the appointment and taking away from her husband or his heirs, that which was already vested in them by means of the appointment of the 14th April, 1761. Therefore, the claim of the devisees must be set aside.

[\*152] \*The claim of the residuary legatees appears to me to be still weaker.

It is settled that, for the purpose of determining as to the execution, of a power with respect to personal estate, you shall not be permitted to go into evidence of what the estate was. The distinction is clearly recognized, not only by what took place in the case of *Standen v. Standen*, but also in the cases of *Jones v. Tucker*, and of *Jones v. Curry*. And it is observable that the question about the revocation of the power can hardly be said to arise with respect to the residuary legatees ; because the residuary legatees allege, not that there was not a power, but that that which had been the subject of the power had become personal estate, by the act either of Mr. and Mrs. Pyott jointly, or of Mrs. Pyott separately. Now, if so, and it was in the state and character of personalty, it could not be subject to any power at all, and there-

1697.—*Hougham v. Sandys.*

fore, the question about power is altogether to be set aside. And then, thinking, as I do, that the fund remained impressed with the character of real estate, can I adopt this construction which the residuary legatees ask for, namely, that the words which I am going to state, should be taken, not as an execution of the power, but as an explicit declaration, on the part of Mrs. Pyott, that the character of real estate should depart from the trust fund, that the character of personal estate should be impressed upon it, and that then these very words should pass the estate, so converted into personality, to the residuary legatees? The words are: "and as to all and singular my ready money and securities for money," &c. It has been said that this sentence must be construed so as to pass the property in question, because, although it appears, in evidence, that Mrs. Pyott had, at the time of making her will, securities for money and money in the public funds, \*yet it does [\*153] not appear that she had any money standing in the name of a trustee, except those mortgage funds which stood in the name of Mr. Johnson or Sir Robert Johnson Eden. It appears to be a visionary and wild exposition of words, which are so general in their nature, and which it is perfectly clear that the testatrix used for the mere purpose of comprehending every thing which was her personal estate, to give them any construction which would turn, at once, real into personal estate, and then pass it in that character. And, therefore my opinion is that the instrument of the 14th April, 1761, is now to be taken as a good instrument, the defect in the attestation being cured by the statute; that it never was avoided; and that, therefore, it passed all that portion of the fund which remained unconverted from the character of real estate,[1] and vested the whole in Mr Pyott, as a reversion which would descend: and the only remaining question is, to whom did it descend?

It has been said, on the part of the gavelkind heirs, that it must be considered that, inasmuch as part of the settled property was land in the county of Kent, the combined fund which arose from the sale of the gavelkind lands in Kent, and of the common soccage lands elsewhere, ought to be apportioned, and that it ought to be considered that the trust to lay out the purchase money in the purchase of lands, tenements and hereditaments being freehold of inheritance, created a right to have a portion laid out in the county of Kent. But it appears to me that that is perfectly fanciful. It is observable that it is not every species of inheritance in the county of Kent which is held to be gavelkind; because it has been expressly \*decided in the case [\*154] of *Doe v. The Bishop of Llandaff*,(b) that, where there was a rectory which had been annexed to one of the greater monasteries, which was afterwards dissolved, although the lands belonging to the rectory would descend according to the gavelkind law of Kent, yet that the tithes would not; because the tithes did not become lay fee until the time of H. 8; and, in order to

(b) 2 New Rep. 491.

[1] As to equitable conversion of property, *Craig v. Leslie*, 3 Wheat. 563. 2 Story's Eq. 98, 102, 458, 461.



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1837.—*Hougham v. Sandys*.

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make that which is a freehold of inheritance descend according to the law of Kent, it must have been freehold of inheritance, which could be presumed to have been such at the time of the conquest. Am I then to be asked to decide that, under the general trust to invest the purchase money in the purchase of other freehold lands of inheritance, a trust actually subsisted which parties had a right to insist on, and which a court of equity would execute, to invest a portion of this purchase money in gavelkind land? This, as I said before, appears to me to be perfectly fanciful, and my opinion, therefore, on the whole of this case, is that Sir Robert Johnson Eden, who is the heir at law of Mr. Pyott, takes, by virtue of the appointment, the three sums of 8,900*l.*, 1,000*l.* and 1,500*l.*, which at present have impressed on them the character of freehold of inheritance.

END OF PART I.

## CASES IN CHANCERY

BEFORE

### THE VICE-CHANCELLOR.

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\*WADE V. COOPE.

[\*155]

1837; 11th, 12th, and 19th December.—*Principal and surety.*

A surety for part of a debt is not entitled to the benefit of a security given by the debtor to the creditor, at a different time, for another part of the debt.

IN 1812, John Brice, the elder, being indebted, to the defendant Henry Twynam, to the amount of 1200*l.* on balance of account, was required by Twynam to give security for the debt; upon which Brice proposed to give to Twynam three bonds, each for 400*l.* and interest, the first to be executed by Brice and the defendant Coope; the second, by Brice and the defendant William Rogers; and the third, by Brice and one Smith. The two first of these bonds were executed accordingly, and were dated the 5th of August, 1812, and conditioned for payment on the 24th of December, 1814; but Smith refused to execute the third bond. In consequence of this, Brice agreed to give to Twynam a mortgage for 1000*l.* upon his estate in Hampshire, as a further security for the debt. Accordingly, by an indenture, dated the 20th of August, 1813, reciting that Brice was indebted to Twynam in 1000*l.* on balance of all accounts on that day settled between them; and that, in order to secure the payment of that sum with interest, Brice had agreed to demise the estate to Twynam in manner \*thereinafter mentioned; Brice demised [\*156] it to Twynam for 1000 years, by way of mortgage, for securing the 1060*l.* and interest. In the same month Brice executed a second mortgage of the premises to one Covert, for 500 years, for securing 500*l.* and interest. In October, 1814, Brice borrowed 1000*l.* of the plaintiff, out of which he redeemed Covert's mortgage; and by an indenture dated on the 15th of that month, mortgaged the estate to the plaintiff for 700 years, for securing the 1000*l.* and interest. In 1817 Brice died, leaving the defendant, John Brice the younger his eldest son and heir at law. After Brice's death, Twynam required Rogers and Coope to pay him what was due on their respective bonds. Rogers complied, but Coope refused; upon which Twyman commenced an action against Coope upon the bond in which the latter had joined. Coope then filed a bill in the court of chancery against Twyman and the personal represen-

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1827.—Wade v. Coope.

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tatives and heir of Brice, praying that the bond might, for the reasons therein stated, be delivered up to him to be cancelled; that an account might be taken of the rents of the mortgaged estate received by Twynam, and the amount be declared to have been received in satisfaction of the bond debt; that the estate might be sold if necessary, and the proceeds applied in satisfaction of the remainder of the debt; and for an injunction to restrain the prosecution of the action. Coope applied for the injunction, but without success; and Twynam recovered, in the action, the full amount of his debt and costs. An order was afterwards made in the suit, that Coope should be at liberty to pay to Twynam the balance due on the mortgage; and that thereupon Twynam should deposit the title deeds in the master's office.

[\*157] \*In pursuance of this order, Coope paid 636*l.* to Twynam. In October, 1826, Brice the younger sold his equity of redemption in the mortgaged estate to the plaintiff; and, on the 26th of that month, conveyed it to the defendant George Twynam, in trust for the plaintiff, who entered into possession.

The bill in this cause insisted that the plaintiff Wade was entitled to the benefit of his mortgage, and to redeem the first mortgage in preference to Coope, who had no lien on the premises in respect of his bond, inasmuch as the first mortgage was a distinct transaction, subsequent to and independent of the bond; and it prayed that the plaintiff might be let in to redeem that mortgage upon payment, to Coope, of what remained due upon it.

Coope, in his answer, contended that the conveyance, of the equity of redemption, to the plaintiff, was void as against him; because it was taken with full knowledge of the existence of the first suit, and of his claims, as a special creditor of Brice the elder, in respect of the bond, and that Wade was not entitled to redeem the first mortgage upon the terms stated in his bill, but that, inasmuch as the giving of the bonds, and the making of that mortgage were but one transaction, and were given as securities for one and the same debt, he, Coope, as a surety for Brice the elder, was entitled to the benefit of the mortgage, to the full extent of the principal and interest thereby secured, in satisfaction of the money recovered from him on his bond, and that he had a lien on the mortgaged premises to that extent, and was also entitled to be paid thereout the sum which he had paid to Henry Twynam under the

[\*158] \*order made in the first suit; that Wade was not entitled to receive any benefit from the mortgaged premises, until the whole of the principal and interest secured by the indenture of the 20th of August, 1813, should have been paid; and that he, Coope, was entitled, as a surety for Brice, to stand in Henry Twynam's place, and to have all the securities, held by Twynam, given up for his benefit.

Mr. Sugden and Mr. Romilly, for the plaintiff Wade:—The mortgage to Henry Twynam was not made until a year after the bonds were executed. It has never been decided that a surety in a prior transaction between debtor and creditor, can claim the benefit of securities given in a subsequent transaction.

1827.—Wade v. Coope.

It appears, from *Copis v. Middleton*,<sup>(a)</sup> that the surety is entitled to stand as a simple contract creditor only of the principal; and Lord Eldon, C. limits the rule to its being part of the same transaction. The mortgage to Twynam is independent of any question of suretyship. Then there is the mortgage to Wade. He says that, Twynam's mortgage being reduced by payments, he claims to redeem it, on payment of the reduced sum. Coope claims to be mortgagee, and contends that Wade is not entitled to the benefit of the payments. But, in whatever way a prior mortgage is paid off, the second mortgage is let in. Unless the first mortgage is kept on foot, it cannot be set up against the second mortgagee. Coope is attempting to tack his bond to the mortgage, so as to exclude the second mortgagee. The bonds were not given for securing one entire sum of \*money, but each for a sepa- [\*159] rate sum.<sup>(b)</sup> *Ex parte Rushforth*,<sup>(b)</sup> *Wright v. Morley* <sup>(c)</sup>

Mr. Heald, and Mr. Koe, for the defendant Coope:—It appears, upon the face of the bill, that the mortgages and bonds were one transaction; for it is stated that, in consequence of Smith's refusing to execute the third bond, Brice agreed to execute the mortgage to Henry Twyman: "as a further security for the said debt of 1,200*l*." It has never been decided that a surety is not entitled to the benefit of an additional security obtained by the creditor, though at a subsequent time, provided it be for the same debt.

Mr. Girdlestone, Mr. Wray and Mr. J. Romilly appeared for the other parties.

The VICE-CHANCELLOR:—The question that arises in this case is, whether it can be considered that the defendant Coope, by having paid off the bond, has acquired a lien on the real estate of Brice the original debtor; or, to put it in other terms, has a right to avail himself of the security given by Brice on Twynam.

Now the bill puts the plaintiff's case entirely on this point, namely, that the mortgage given to Twynam is a separate transaction from the transaction relating to the bond; for it charges that the mortgage to Twynam was a distinct transaction, subsequent in point of time and independent of the said bond.

\*Now it is attempted to be argued that it was not a distinct transac- [\*160] tion; because it related to the same debt: and that was the only way in which it was possible to maintain the case as against Wade. It appears to be made out, most distinctly, that the bond was given in respect of one part of the old debt, and the mortgage in respect of another part of it.

The bonds and the mortgage were, in one sense, given in respect of the same debt, though they were, in fact, given for different parts of the same debt, and were, altogether, distinct and separate transactions. The doctrine laid down by Lord Chancellor Eldon, in the case of *Mayhew v. Crickett*,<sup>(d)</sup> not then for the first time, but the result of a long series of cases is, that, where a man becomes the surety for a debtor for the payment of a debt, he has, if he

(a) 1 Turn. 224. See 231. (b) 10 Ves. 409. (c) 21 Ves. 12. (d) 3 Swanst. 185.

1828.—*Nye v. Moseley*.

pays the debt, a right to avail himself of all the securities which the creditor has.[1] But that doctrine never applies to a person who becomes surety at one time, and a security is given, to the same creditor, either for another debt, or, what is the same thing, for a distinct portion of the debt for which the first security was given. I have not found any such case: on the contrary, all the notion I have of the law is that the doctrine has always been stinted to the particular contingency of the debt being one, and the security being given for the same debt, at the time when the person became surety for it.

It appears to me that Wade has made out his right to redeem: and that this right is not affected by the transaction; because a right to redeem he certainly had, standing in the situation of second mortgagee.

[\*161] \*The 636*l.* paid by Coope to Twynam must, of course, be repaid by Wade to Coope. So much of that sum as consisted of principal will, of course, carry interest, and therefore interest must be paid also on that sum or the part of that sum which carries interest: and it appears to me that Wade must have a decree, as against Coope, with costs.

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NYE *v.* MOSELEY.

1828; 16th January.

A REPORT of this case, as it came before the court upon the argument of a demurrer, will be found in 1 Sim. & Stu. p. 61.(a) The cause was afterwards heard; and, at the hearing, the court directed a case to be stated for the opinion of the court of K. B. See 6 Barn. & Cress. 133. On this day the cause came on to be heard for further directions; upon which occasion the defendant was ordered to execute a new bond with a condition similar to that of the former one, and to pay the costs of the suit and of the case at law.

(a) This case is reported under the names of *Knye v. Moore*.

[1] Vide *Cheesebrough v. Millard*, 1 Johns. Ch. Rep. 409. *Cuyler v. Ensworth* 6 Paige, 32. *Eddy v. Traver*, id. 521. *United States Bank v. Stewart*, 4 Dana, (Kentucky.) 27. *Patterson v. Pope*, 5 Dana, 243. *Pride v. Boyce*, 1 Rico, (South Carolina,) Eq. Rep. 275. *Bank v. Adger*, 2 Hill, (South Carolina,) 266. One surety who pays the debt is entitled to the same equity as against his co-surety. *Cheesebrough v. Mills*, ubi supra. *Cuyler v. Ensworth*, ubi supra. *Woods v. Creaghe*, 2 Hog. 50. The surety of a surety though compelled to pay the creditor, is not entitled to be substituted in the place of creditor for the purpose of enforcing the payment against the principal debtor, if such debtor has paid his immediate surety. *New York State Bank v. Fletcher*, 5 Wend. 85. A surety cannot ask the use of the securities and remedies of the creditor to enforce payment against the principal, without tendering an indemnity against all costs and expenses. *Beardsley v. Warner*, 6 Wend. 610.

1828.—*Waterhouse v. Holmes.*\**WATERHOUSE v. HOLMES.*

[\*162]

1828; 17th January.—*Mortmain.*—*Charity.*

A bequest of a sum of money to pay off a debt secured, by an equitable charge only, upon a meeting-house, is void.

BETTY AMBLER, by her will, dated the 23d of October, 1820, gave all her personal estate to Thomas Holmes and William Nicholson, upon trust, amongst other things, to pay thereout the sum of 400*l.* to the trustees or treasurer for the time being of the Methodist meeting-house at Baildon, in the county of York, to be applied, in the first place, for and towards the paying off and discharging any debt, or sum or sums of money which might be due or owing upon the said meeting-house at the time of her decease, and the overplus, if any, to be applied to such other purposes of the said meeting-house as the trustees or treasurer for the time being should, in their discretion, see fit. The testatrix died on the 7th of December, 1820.

The following facts were found by the master, in pursuance of a reference, made to him by the decree, to inquire and state whether, at the death of the testatrix, there was any and what debt upon the meeting-house.

The meeting-house, and the land on which it was built, had been paid for out of a fund raised by subscription; and, by an indenture dated the 18th of May, 1807, the person of whom the land was purchased, conveyed it to trustees, who were the subscribers of the fund, and who were thereby empowered to choose a treasurer, who was to receive all the seat rents and other emoluments arising from the chapel, which were to be applied in paying the principal and interest of all moneys due on the chapel and pre- [\*163] mises, and in keeping them in repair: and the trustees were also empowered, after the interest of the moneys so due should have been paid, to allow all or any part of the surplus for the support of the preacher, and, if necessary, to mortgage the premises till the debt contracted should be reduced as far as they should judge expedient. At the testatrix's death there was a debt of 439*l.* 12*s.* 7*d.* due upon the meeting-house to the subscribers, and that debt still remained unpaid. The subscribers claimed to have a lien on the title deeds of the meeting-house, (which were in their possession,) and to be equitable mortgagees thereof, for the amounts of their respective subscriptions; but there was no other debt affecting the meeting-house.

The cause now came on for further directions.

Mr. Cooper and Mr. Harrison Batley, for the residuary legatees under the will, contended that the bequest of the 400*l.* was void under 9 G. 2, c. 36, and cited *Corbyn v. French*.(a)

Mr. Bickersteth for the treasurer of the meeting-house:—The master has not found that the debt was a charge upon the meeting-house, but merely that

(a) 4 Ves. 418.

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 1828.—*Ripley v. Woods.*


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the subscribers conceived that they had an equitable lien on the title deeds. The third section of the act does not apply in this case, for it relates to charges on lands and not on title deeds. Next, the will gives to the trustees [\*164] a discretionary power to apply so much of the \*legacy as should not be required for discharging the debt on the meeting-house, to other purposes connected with it, which are not within the statute; and if no part of the legacy is required to pay the debt, then the whole is overplus. The act applies to legal interests only; but, if equitable interests also are within it, then the discretionary power given to the trustees entitles them to be paid the legacy.

The VICE-CHANCELLOR:—The option is given in the event only of there being no debt on the meeting-house. The report finds, expressly, that there is such a debt. There is no substantial difference between a legal and an equitable mortgage. If it were otherwise, a mortgage after a mortgage in fee would not be within the statute. My opinion, therefore, is, that this bequest is void.[1]

[\*165]

\*RIPLEY v. WOODS.

1828; 26th January.—*Husband and wife.*—*Chose in action.*

A man whose wife was entitled to personalty, subject to a life interest in A. becomes bankrupt, and afterwards obtains his certificate; then A. dies, and afterwards the wife, and the husband takes out administration to her; held, that his assignees are nevertheless entitled to the property.

A TESTATOR bequeathed a fourth part of the residue of his personal estate to his daughter, the plaintiff's wife, after the death of his widow, to whom a life interest was given. The testator died in 1807. In November, 1816, the plaintiff and his wife assigned their interest in the testator's estate to Nancy Pugh, for securing 1000*l.* lent by her to the plaintiff. In January, 1817, the plaintiff became bankrupt, and, in the November following, he obtained his certificate. In July, 1821, the testator's widow died. In October of the same year the plaintiff's wife died; he obtained administration to her, and filed the bill, claiming to be entitled to the fourth share of the personalty bequeathed to his wife. The plaintiff's assignees were defendants, as were also the assignees of Nancy Pugh, who had in the mean time, become bankrupt.

Mr. *Bickersteth* and Mr. *Duckworth*, for the plaintiff:—The question is, whether the interest of the plaintiff's wife passed, by the assignment, to his assignees. At the time of the bankruptcy the wife had a reversionary right to her share, subject to the life interest of her mother. It could not be then reduced into possession. How was it to pass to the assignees? The husband had nothing that was then capable of being sold. The wife died after her husband had obtained his certificate. It was by virtue of the administration

[1] Vide *Davis v. Hopkins*, 2 Beav. 276.

1828 — *Pierce v. Thornely.*

that he acquired the right, which he now has, to the possession of the fund. How could the assignees be entitled \*to receive that which he [\*166] became entitled to long after obtaining his certificate? *Purdew v. Jackson*, (a) *Hornsby v. Lee*, (b) *Honner v. Morton*. (c)

Mr. *Pepys*, and Mr. *Spence*, for the husband's assignees:—At the bankruptcy, the husband's interest might or might not come into possession. Whatever a bankrupt has or may have, passes by the assignment. Here he had a possibility or chance. The assignees might have sold the chance, whatever it might be, that the husband had of becoming entitled. In the cases referred to, the question was, whether the husband could defeat, by assignment, his wife's chance of becoming entitled by survivorship. We do not dispute the husband's right to receive the property, but whether he is entitled to retain it.

Mr. *Bickersteth*, in reply:—The plaintiff stands in the situation of the legal personal representative of his wife, who was entitled to the fund, in possession, at the time of her death. The plaintiff insists upon his legal right: could his assignees have made out any title to it? How could they have shown that they would ever have a vested right in possession? Sir Thomas Plumer, M. R. in delivering his judgment in *Purdew v. Jackson*, says: "Another fallacy," &c. (d)

Mr. *Sugden* and Mr. *Jacob* for the other defendants.

\*The VICE-CHANCELLOR:—My opinion is that the assignees of the [\*167] husband are the persons entitled to the fund in dispute.

The husband, by the marriage, had an incipient right to that chose in action which would become vested in his wife, if she survived her mother; and as that event happened, it became vested in her, by means of which the husband could reduce it into possession. The husband, therefore, had, at his bankruptcy, an incipient right which was capable of being passed by the assignment. (e)

#### PIERCE V. THORNELY.

1828; 4th February.—*Baron and Feme—Chose in action.*

The husband of a woman, having a vested interest in possession in a legacy, becomes bankrupt: his assignee files a bill against the testator's executors, to compel payment of the legacy, and soon afterwards the husband dies: held, that the widow, and not the assignee, is entitled to the legacy.

THOMAS BROMILOW, by his will, dated the 1st of January, 1798, bequeathed certain household goods and other articles to his wife, Margaret, and his daughter, Jane Butler. And, after reciting that he was seised, to him and his heirs, of and in certain freehold, copyhold and customary messuages, and other

(a) 1 Russ. 1. (b) 2 Madd. 16. (c) 3 Russ. 65. (d) See 1 Russ. 59, 60.

(e) See next case. [Acc. *Harper v. Ravenhill*, 1 Tamlyn, 144, which differs from the above case only in this, that the wife died before the determination of the life interest.]



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 1828.—*Pierce v. Thornely.*


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hereditaments, he devised, unto his nephew, Robert Mollineux and William Thornely, their heirs and assigns, all the said hereditaments and premises, with their appurtenances, as well copyhold as freehold, along with the residue of his personal estate, which he thereby directed the trustees to place out at interest on real or government security, and to apply the interest in the [\*168] same manner as was directed for the application \*of the rents and profits of his real estates, upon the several trusts therein mentioned concerning the same : (that is to say) upon trust to sell and let the said messuages, lands and premises for the life of his daughter, Jane Butler ; and if her husband, William Butler, should survive her, to let the whole of the premises, and to receive the rents and profits thereof upon the trusts therein mentioned ; (that is to say) in trust thereout, as well as out of the interest of the testator's personal estate, to pay to his wife, Margaret, for her life, an annuity of 100*l.* ; and then in trust to pay the residue thereof to his daughter, Jane Butler ; and after his wife's decease, to apply her annuity unto his daughter ; and after her decease, to divide the same, as well as all his real and personal estate, equally amongst all the children of his daughter who should attain the age of twenty-one years, except his grandson Thomas, until they should each of them have received from it 800*l.* a-piece, if it would so far extend ; and, in case there should remain any surplus after they had received their 800*l.* a-piece, then the testator directed such surplus money to be equally divided amongst all the children of his daughter who should attain the age of twenty-one, and the issue of such of them as should be then dead ; such issue to take the parent's share : but, if his daughter Jane should die in the life-time of her husband W. Butler, without leaving any issue, or such issue should die under age, unmarried and without issue, then the testator empowered the trustees to sell any part of his copyhold estates, if they should judge it best for the interest of his daughter and her heirs, putting the money arising from the sale out on real or government securities, for the purpose before mentioned ; and he appointed Robert [\*169] \*Mollineux and William Thornely executors and trustees of his will.

Thomas Bromilow died soon after making his will, leaving his wife, Margaret Bromilow, and his daughter, Jane Butler, him surviving. Robert Mollineux died almost immediately after the decease of the testator, leaving William Thornely him surviving, who alone, on the 10th of September, 1799, proved the will and accepted the trusts thereof, and, soon after the death of the testator, entered into the possession or receipt of the rents and profits of his real estate, and applied them and the interest of the residue of the personal estate as directed by his will, until the death of the testator's daughter, Jane Butler ; and, after her death, he sold the whole of the real estates, and received the moneys arising therefrom, and the rents which accrued in the mean time, and the interest which subsequently accrued on such moneys and the securities in which the same were invested, and he also received the interest on the clear residue of the testator's personal estate. The funds so received

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1828.—*Pierce v. Thornely.*

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were much more than sufficient to answer the legacies of 800*l.* directed to be paid and deducted thereout, in the first instance, for the benefit of the younger children of Jane Butler.

Margaret Bromilow died in March, 1812, and Jane Butler, in June, of the same year, leaving Eliza Jane Butler, and five other children, her surviving. Eliza Jane Butler attained the age of twenty-one in 1817; and she, at the time when the bill was filed, was the wife of Ambrose Wilkinson. James Butler, one of the children, died an infant; but the youngest of the survivors attained the age of twenty-one years in 1824.

\*The bill after stating that, in 1817, Ambrose Wilkinson married [\*170] Eliza Jane Butler, alleged that, thereupon, he became entitled, in right of his wife, to the legacy of 800*l.* given to her by the will of the testator, with interest from the time she became of age, and to one-fifth part of the residuary real and personal estates of the testator and the produce thereof, and the rents and interest received therefrom since the death of Jane Butler. The bill then stated, that, on the 20th of September, 1820, a commission of bankrupt was issued against Ambrose Wilkinson, and that the plaintiff was chosen assignee of his estate: that at the time of the bankruptcy the whole of the legacy of 800*l.* and interest, and the fifth share of Ambrose Wilkinson, in right of his wife, in the residuary real and personal estates, and the rents, interest and produce thereof respectively remained due, with the exception of several small sums, not exceeding in the whole 217*l.* 10*s.*, which it was alleged had been previously paid to her or her husband. The bill charged that, by an account of the residuary real and personal estates, and the produce thereof, rendered to the plaintiff by William Thornely, and made up by him, on the occasion or to the time of William Robert Molineux Butler (the youngest of the surviving children of Jane Butler) attaining his age of twenty-one years, the amount thereof, without deducting the legacies of 800*l.* given to the younger children of Jane Butler, was stated at the sum of 4,355*l.* 4*s.* 4*d.*; but that, in such account, no allowance was made for interest, to the younger children, on their legacies of 800*l.*, from the time they respectively attained the age of twenty-one years, which the plaintiff submitted ought to have been \*allowed and deducted: that the plaintiff had [\*171] always been ready to allow a fair and proper proportion of the legacy and share to be settled on Eliza Jane Wilkinson. The bill prayed that it might be declared that the plaintiff, as assignee of Wilkinson's estate, was entitled to the legacy of 800*l.* to which Wilkinson, in right of his wife, became entitled, with interest from the time she attained the age of twenty-one years, and also to one fifth part or share to which he, in right of his wife, became entitled in the residuary real and personal estate of the testator, and the produce thereof, and the interest received and accrued on account thereof since the death of Jane Butler, after deducting what should appear to have been paid in respect thereof previous to the bankruptcy, and subject to a proper settlement thereout on Eliza Jane Wilkinson: and if necessary, that the

1828.—Pierce v. Thornely.

usual accounts might be taken of the testator's real and personal estates; and that the clear residue, after deducting the legacies of 800*l.* and the interest which accrued thereon, might be ascertained: and that, in taking such account, William Thornely might be charged with interest, from the decease of Jane Butler, on the share of Ambrose Wilkinson, in right of his wife, in such parts of the moneys and estates as should have remained in his hands uninvested, and that he might be decreed to pay what should be found due from him in respect of the legacy of 800*l.* and interest, and of the share in the residue, after deducting what should appear to have been paid by him in respect thereof before the bankruptcy; and that, if necessary, it might be referred to the master to approve of a proper settlement, out of the legacy and share, on Eliza Jane Wilkinson, and that the legacy and interest and share in [\*172] the residuary \*real and personal estate, and the produce thereof, subject to the deductions aforesaid, might be paid to the plaintiff.

The widow and defendant Thornely, put in a plea stating that the bankrupt had died since the filing of the bill.

Mr. *Booth*, in support of the plea:—It is not, I understand, intended to object to the form of the plea. The question is, whether in this case there is anything to bar the right of the wife to the chose in action. It is now established that the assignment in bankruptcy does not bar the right of the wife. *Gayner v. Wilkinson*,<sup>(f)</sup> *Mitford v. Mitford*.<sup>(g)</sup> The same doctrine is recognized by Sir Thomas Plumer, M. R. in *Purdew v. Jackson*.<sup>(h)</sup> There is nothing to distinguish this case, except the circumstance of the bill having been filed before the husband died. But, if the husband had died after a decree had been made for payment to him, the wife's right by survivorship would not have been affected. *Nanny v. Martin*.<sup>(i)</sup> So that in this case we are clearly entitled to have the plea allowed.

Mr. *Walker*, for the plaintiff:—The plaintiff is entitled to the wife's legacy and share of residue, subject to her equity for a settlement. The assignment in bankruptcy bars the wife's right of survivorship to an equitable chose [\*173] in action, \*which was immediately recoverable: or, if it does not, the assignment and a suit instituted for the purpose of recovering the chose in action, will have that effect. No case has been cited in which it has been decided that the assignment had not this effect, if the fund was immediately recoverable. The question as to its operation, notwithstanding what is said by Sir William Grant in *Mitford v. Mitford*, is not settled; and in the late case of *Purdew v. Jackson*, Sir Thomas Plumer considers such an assignment as equivalent to one for valuable consideration.<sup>(k)</sup> It is not necessary in this case to decide what is the effect of the assignment on the wife's legal chose in action; but, unless a different rule is to be applied to equitable choses in action, *Miles v. Williams*,<sup>(l)</sup> and *Pringle v. Hodgson*,<sup>(m)</sup> are authorities that the right of survivorship is barred. This case may be decided on a narrower ground. An

<sup>(f)</sup> 1 Bro. C. C. 49.<sup>(g)</sup> 9 Ves. 87.<sup>(h)</sup> See 1 Russ. 53.<sup>(i)</sup> 1 Ch. Ca. 27.<sup>(k)</sup> See 1 Russ. 27, 53.<sup>(l)</sup> 1 P. Wms. 249.<sup>(m)</sup> 3 Ves. 617.

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assignment of the wife's equitable chose in action immediately recoverable, for valuable consideration, bars her right of survivorship; and an assignment in bankruptcy, on principle and authority has the same effect. *Bates v. Dandy*,<sup>(n)</sup> and *Earl of Salisbury v. Newton*,<sup>(o)</sup> are decisive authorities for the right of an assignee for valuable consideration. Sir Thomas Plumer admits it in *Johnson v. Johnson*;<sup>(p)</sup> and the late cases on the husband's assignment of reversionary choses in action, proceeding on the distinction of their not, on that account, being reducible into possession, are authorities to the same effect. The assignment in bankruptcy has the same operation. Where the chose in action is immediately recoverable, it changes the property; it is an inter- [\*174] rest which the bankrupt might release. The whole argument in *Mitford v. Mitford*,<sup>(q)</sup> rests on two propositions, that the assignment passes the property in the same plight and condition as the bankrupt possessed it, and that the assignees are mere volunteers. The first is not true, without this qualification, except as far as it is operated on by the assignment. The question respecting the effect of the assignment, still remains. But that the property does not pass in the same plight, may be illustrated by the case of a joint tenant becoming a bankrupt; the assignees do not become joint tenants with his companion; the joint tenancy is severed by the assignment. The assignees are not volunteers. Independently of the extensive words in the bankrupt act, the debts form a sufficient consideration: if they were mere volunteers, they could not maintain a suit in equity; this court never giving effect to an assignment purely voluntary. The practical inconvenience of a contrary doctrine is an important consideration. It would, in that case, be the duty of the assignees immediately to sell the chose in action, in order to guard against the accident of the husband's death; and, as the extent of the wife's equity is well settled, there would be no difficulty in finding a purchaser. This circuitry ought to be avoided. *Bosvil v. Brander*,<sup>(r)</sup> and the opinions of Lord Henley in *Earl of Salisbury v. Newton*, and Sir Thomas Plumer in *Purdew v. Jackson*, are strong authorities in favor of an assignment in bankruptcy standing, in this respect, on the same ground as one for a valuable consideration. In *Gray v. Kentish*<sup>(s)</sup> the interest continued reversionary until \*after the [\*175] death of the husband; and in *Gayner v. Wilkinson*, *Saddington v. Kinsman*, and *Mitford v. Mitford*, the only cases cited for the defendants, it was reversionary at the time of the bankruptcy; they are, therefore, clearly distinguishable from this case, in which the property was vested in possession, or recoverable, at the time of the bankruptcy. In this case the property passed, subject, of course, to the wife's equity; in the others nothing could pass but the right to the property; to bar the wife's right of survivorship, another assignment, or some other act, was necessary after the death of the tenant for life. The same distinction prevailed in *Hornsby v. Lee*;<sup>(t)</sup> in which

<sup>(n)</sup> 2 Atk. 207.<sup>(o)</sup> 1 Eden, 371.<sup>(p)</sup> 1 Jac. & Walk. 476.<sup>(q)</sup> See 9 Ves. 100.<sup>(r)</sup> 1 P. Wms. 458.<sup>(s)</sup> 1 Atk. 280.<sup>(t)</sup> 2 Madd. 16.

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case Sir Thomas Plumer held that the wife's right of survivorship would prevail over an assignment by the husband for valuable consideration of her reversionary chose in action, although the tenant for life died before the husband; therefore, in deciding in favor of the plaintiff, no case will be overruled.

The commencement of the suit fixes the right of the assignees. The decree must proceed on the rights of the parties as they originally stood. A contrary decision would lead to much inconvenience, and hold out an inducement to resort to trick and contrivance in order to retard the progress of the suit. In *Steinmetz v. Halthin*,<sup>(u)</sup> it was held that the wife's equity to a settlement attached on the institution of the suit; in other words, that the commencement of the suit affected her husband's legal right of survivorship. It would not be fair to apply a different principle in the case of the husband dying first: if his legal right is diminished, her's ought to be abridged to the same extent.

[\*176] \*At all events the plaintiffs are entitled to the interest of the fund up to the time, if not beyond the period, of the bankruptcy. The right to the interest stands on a different ground: it is a breach of trust in the trustees not to pay it to the husband. A court of equity always gives him the interest of his wife's fortune, provided he maintains her. *Macaulay v. Phillips*.<sup>(x)</sup>

The VICE-CHANCELLOR:—By the will of Thomas Bromilow, who died about 1798, freehold and copyhold estates, and residue of personal estate, were given to Mollineux, deceased, and the defendant Thornely, upon trust to sell, and invest the produce in securities, in trust for his daughter, Jane Butler, for her life; then to pay legacies of 800*l.* to all her children who should attain the age of twenty-one years, and the surplus to go to all her children who should attain twenty-one.

In 1799 the will was proved by Thornely alone.

Jane Butler died in June, 1812, leaving six children. Eliza Jane, one of them, attained twenty-one in 1817. After Jane Butler's death the real estates were sold and the produce invested. In 1817, Eliza Jane married Ambrose Wilkinson. On the 20th September, 1820, a commission of bankruptcy was issued against him, and the plaintiff became his assignee. On the 2d of May, 1827, the bill was filed by the plaintiff, against Thornely and the bankrupt and his wife, for payment of Eliza Jane's legacy and share of residue. On the 18th June, 1827, the bankrupt died. Thornely and the widow plead

[\*177] that fact: and the question is, whether the plaintiff \*is entitled to any part of the wife's legacy and share of residue, or to any of the interest due, the plaintiff's title being as assignee of a bankrupt, and the chose in action having vested in possession before the bill was filed.

If a debt were due to a woman, *dum sola*, and she married, her husband, by bringing an action in the names of himself and his wife, might recover judgment in the names of himself and his wife; and, by taking out execution, might alone receive the amount of the debt, and so acquire possession of his wife's

(u) See 1 Glyn & Jam. 68.

(x) 4 Ves. 15.

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chose in action. But if, at any time before taking out execution, he should die, and the wife survive him, she would be entitled to the benefit of the action ; and, if it had proceeded to judgment, would be entitled to take out execution for her own benefit. That this is the rule at law, and that the same rule is adopted in equity, appears from the case of *Nanny v. Martin*,<sup>(y)</sup> where baron and feme had a decree for money in the right of the wife, and then the baron died. The question was moved, who should have the benefit of the decree, the wife or the executor of the husband ? The case being referred to C. J. Hide, he had given his opinion that the benefit of the decree belongs to the wife, and that it was so in a judgment at law ; and, exception being taken to that certificate of the judge, he refused to hear the matter of the exception, but left it to the chancellor, declaring that his opinion still was the same : and, at the seal, the Lord Chancellor would not refer it back, but confirmed the judge's certificate.

\*If the husband of the wife, who had a debt due to her *dum sola*, [\*178] had become bankrupt, the assignees could not recover payment of the debt without bringing an action in their own names and the name of the wife jointly ; for, by the commissioner's assignment they take an interest in the debt in the same manner as the husband had it ; and if, after proceeding in the action, and before execution levied, the husband died, at law the chose in action would survive to the wife, and she might release the action, as a co-plaintiff, or release the debt, as entitled to it by survivorship. At law, the wife's chose in action could be recovered only in an action in which she was made co-plaintiff with her husband,[1] or with his assignees, in case he became a bankrupt. If the chose in action were equitable, the wife is not of necessity to be made a co-plaintiff—she must be a party to the suit. This was decided in *Clarke v. Lord Angier* :<sup>(z)</sup> but she may be either a defendant or a co-plaintiff. At law, where judgment had been recovered by the husband and wife, the husband alone could levy execution ; but a court of equity will not, unless the wife consents, permit the husband to recover the whole of his wife's chose in action, but will require a settlement to be made upon her.[2] In so doing, a court of

(y) 1 Cha. Ca. 27.

(z) 1 Cha. Ca. 41.

[1] *Wombwell v. Laver*, post, 364.

[2] Vide *Smith v. Kane*, 2 Paige, 302. When the husband or his assignee, seeks through the intervention of a court of equity, to gain possession of the wife's property, the court will require a suitable provision to be made for her, which is called her equity. "It is now understood to be settled, that the wife's equity attaches upon her personal property, when it is subject to the jurisdiction of the court, and is the object of the suit, into whosoever hands it may have come, or in whatever manner it may have been transferred. The same rule applies, whether the application be by the husband, or his representatives or assignees, to obtain possession of the property, or whether it be by the wife or her trustee, or by any person partaking of that character, praying for a provision out of that property. It is equally binding whether the assignment be by operation of law, or by the act of the party to general assignees, or by particular transfer to an individual, and whether that particular transfer has been voluntary, or been made for a good and valuable consideration." Kent. Ch. *Kenny v. Udell*, 5 Johns. Ch. Rep. 473. "The assignee takes the assignment of the wife's estate in action, subject to her equitable claim thereon for the support of herself and her infant children, if she has no other sufficient means for that purpose ; provided such

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equity not only recognizes the legal principle, that the wife might be entitled by survivorship, but acts upon it for her benefit in a manner which a court of law cannot do.

If these things be so, it is impossible to understand how, where the [\*179] wife has an equitable chose in action, \*the assignment in bankruptcy can pass to her husband's assignees a larger right, or better title than the husband had. Sir Thomas Plumer, in the conclusion of his judgment, in *Purdew v. Jackson*,<sup>(a)</sup> says: "After this repeated consideration of the subject, I still continue of opinion that all assignments, made by the husband, of the wife's outstanding personal chattel, which is not, or cannot be then reduced into possession, whether the assignment be in bankruptcy, or under the insolvent acts, or to trustees for payment of debts, or to a purchaser for valuable consideration, pass only the interest which the husband has, subject to the wife's legal right of survivorship."<sup>[1]</sup> In the present case, the plaintiff claims, merely as assignee in bankruptcy, the wife's equitable, outstanding personal chattel, which is not reduced into possession, and, therefore, according to Sir Thomas Plumer, can only claim it, subject to the wife's legal right of survivorship. In the case of *Gayner v. Wilkinson*, cited in the note to *Saddington v. Kinsman*,<sup>(b)</sup> Mary Pierson was entitled to a reversionary legacy, expectant on her father's death. Her husband became bankrupt: and then the father died, whereby the legacy vested in possession in the life-time of the husband. Then he died, leaving Mary Pierson surviving. The assignees filed a bill for the legacy; and the chancellor dismissed it. That, therefore, is a case directly in point. Lord Thurlow, in the course of the argument in *Saddington v. Kinsman*, asked whether the counsel knew any case that, in point, contradicts *Gay-*

<sup>(a)</sup> 1 Russ. 70.<sup>(b)</sup> 1 Bro. C. C. 50.

claim is asserted by the wife, or there is a suit instituted in this court for the recovery of such property, before the assignee has reduced it to possession. It has indeed been doubted whether this court could interfere to restrain the husband or his assignee, from proceeding at law to possess himself of the wife's property in action, and to compel him to allow her a suitable provision out of the same for her support. But if the wife is entitled to such an equity, upon a bill filed by the husband or his assignee, or by a third person, as all the cases upon this subject admit, I can see no valid objection in principle against granting her similar relief where the husband, or the general assignee in bankruptcy, is endeavoring to deprive her of that equity by an unconscientious proceeding in a court of law." *Van Epps v. Van Deusen*, 4 Paige, 74. If the wife's property in action is of equitable cognizance, she may file her bill against her husband or his assignee, to restrain them from obtaining possession of the fund without providing for her support; *Kenny v. Udall*, ubi sup. S. O., 3 Cow. 590. *Elliott v. Waring*, 5 Monroe's (Kent.) Rep. 341. But see *Howard v. Moffatt*, 2 Johns. Ch. Rep. 208. The practice is for the husband on a reference, to make proposals of a settlement before a master, and on the coming in of his report, the court judges of its sufficiency; *Howard v. Moffatt*, ubi sup. The husband has been allowed on the joint petition of himself and wife, to dispose of her separate property, but the wife will be examined apart from her husband as to her consent, and her equity will be carefully guarded. *In the matter of Stuart*, 1 Edw. V. C. Rep. 168; *Howard v. Moffatt*, ubi sup. And see *Stifle v. Everitt*, 1 Myl. & Cr. 37. *Honner v. Morton*, 2 Russ. 86. *Wade v. Saunders*, Turn. & Russ. 306. *Gullin v. Gullin*, 7 Sim., 236. *Wicks v. Clarke*, 3 Edw. V. C. Rep. 58.

[1] Acc. *Honner v. Morton*, 2 Russ. 65, by Lord Lyndhurst, April 15, 1828, therefore nearly simultaneous with the case in the text.

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*ner v. Wilkinson*, himself not recollecting any. In the case of *Mitford v. Mitford(c)* it is observable that Charlotte Mitford married in 1799; \*but Robert Mitford, the bankrupt, did not die till 1790; therefore, in [\*180] that case, as in *Gayner v. Wilkinson*, his wife's legacy vested in possession before his death; and Sir William Grant held that Robert Mitford's wife, who survived him, was entitled to her legacy, as against the assignees of her husband. In his judgment he comments upon the conflicting authorities of *Bosvil v. Brander(d)* and *Pringle v. Hodgson(e)* as opposed to *Grey v. Kentish* and *Gayner v. Wilkinson*; and his reasoning, to which it is only necessary to refer without repeating it, satisfies me that the law of this court is that which he has laid down in conformity with the decision in *Gayner v. Wilkinson*. I confess myself quite unable to understand upon what grounds Lord Rosslyn rested, when he said, in *Pringle v. Hodgson*: "The question of survivorship is quite laid aside by the bankruptcy."

It has been urged that, inasmuch as, in the present case, the bill was filed before the husband died, the question is to be considered in the same manner as if a decree had been obtained; and the case of *Steinmetz v. Halthin(f)* was cited: but that case decided only that, where a bill was filed to carry into execution the trusts of a will, under which a husband and wife, in her right, were entitled to a legacy, and she died, pending the suit, leaving children, her equity to have a settlement attached for the benefit of her children. That decision, therefore, was a liberal decision, extending the wife's right, and cannot be considered as deciding the converse, that the mere filing of a bill against her and her husband, when she survives him, \*shall be con- [\*181] sidered as an abridgment of her legal right.

It has also been said that the husband was entitled to the interest on the wife's legacy; and that his assignee is entitled to it, on the ground that a court of equity gives the husband interest on his wife's legacy, if he maintains her; and the case of *Macaulay v. Phillips(g)* is cited.[1] But, in the first place, nothing appears on the pleadings in this case as to the bankrupt having maintained his wife; and in the next place, in the case cited, there had been a decree, and proposals for a settlement had been directed. Upon the whole, therefore, I am of opinion that the plea must be allowed.(h)[2]

(c) 9 Ves. 87.

(d) 1 P. Wms. 458.

(e) 3 Ves. 619.

(f) 1 Glyn &amp; Jam. 64.

(g) 4 Ves. 15.

(h) See the preceding case.

[1] If the husband lives with his wife, and maintains her, and has not misbehaved, he will be allowed to receive the interest or dividends on her property. *Kenny v. Udall*, 5 Johns. Ch. Rep. 480.

[2] An assignment by the husband, under a bankrupt or insolvent act, vests in the assignee the personal estate in action of the wife, unless the same is secured to her as her personal property: but the assignee takes the legal interest in the same, subject to the wife's right of survivorship, if the husband dies before the assignee has reduced such property to possession. Such is the result of the various decisions, upon a question which has been "repeatedly agitated, and has excited considerable interest both at law and in equity." *Van Epps v. Van Dusen*, 4 Paige, 64. See further *Honner v. Morton*, 3 Russ. 65. *Wombwell v. Laver*, post, 360. *Field v. Soule*, 4 Russ. 112. *Donne v. Hert*, 2 Russ. & M. 360. *Sansum v. Dewar*, 3 Russ. 91.



1828.—Fleming v. St. John.

## FLEMING v. ST. JOHN.

1828; 4th and 7th February.—*Pleading.*

Where a bill charges a defendant with acts which would subject him to a criminal prosecution under a statute, the defendant need not plead the statute, but may demur to the bill.

IN this case, the defendant demurred to the bill because it sought a discovery of transactions which, if admitted, would have subjected him to a criminal prosecution under 9 Anne, c. 14, s. 5; and the question was, whether the objection ought not to have been made by plea, and not by demurrer.

Mr. *Pepys* and Mr. *Wilson*, in support of the demurrer, cited Mitf. Treat. 157, 158; *Orme v. Crockford*; (a) and said that a public act of parliament was as much within the cognizance of all the courts, as the common [\*182] law was, and that a party was never bound to plead it.

Mr. *Sugden* and Mr. *Girdlestone*, jun. for the bill, said that no objection could be made by demurrer, unless it appeared on the face of the bill; and they referred to *Nash v. Ash*.(b)

The VICE-CHANCELLOR :—The demurrer in that case appears to have been overruled, because it was too general.

7th February.—The VICE-CHANCELLOR :—It struck me, at first, that it was proper to plead in this case: but upon looking at Lord Redesdale's Treatise, and the authorities he refers to, I find it to have been held that, in some cases, where advantage has been taken of a statute, it might be done by way of demurrer, as in the *Earl of Suffolk v. Green*.(c) I have made a note of a case which I argued in the court of exchequer, and which has been since reported.(d) [His honor here read the note.] This case is directly applicable; and I therefore think that the demurrer ought to be allowed.[1]

(a) 1 Macleland's Rep. 185.

(b) 1 Eden, 378.

(c) 1 Atk. 450.

(d) 1 Atk. 450. *Whitmore v. Francis*, 8 Price, 616. The note mentioned above was as follows:—" *Whitmore v. Francis*, Excheq. 14th December, 1820. Bill filed to discover whether a promissory note was not given on an usurious contract. It stated the note to be given for money lent, and that no interest had been paid; and prayed discovery merely by way of defence to action on the note. Demurrer, that the discovery would occasion a loss of the money lent on the note, allowed."

[1] To a bill praying a discovery of usury, that the usurious instrument may be delivered up and cancelled, and for an injunction to stay proceedings at law; the defendant may demur to so much of the discovery as relates to the charge of usury, and may answer to the relief; as in other cases where the complainant is entitled to relief, but where the defendant cannot make a discovery as to the facts upon which that relief is asked, without subjecting himself to a criminal prosecution, or a penalty. *Livingston v. Harris*, 3 Paige, 528. See further *Green v. Weaver*, 1 Sim. 404.

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1828.—Wethered v. Wethered.

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## \*WETHERED v. WETHERED.

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1828; 25th January and 23d February.—*Agreement.—Public policy.*

An agreement between two sons, to divide equally whatever property they may receive from their father in his life-time, or become entitled to under his will, or by descent or otherwise, from him, is not contrary to public policy, but will be enforced in equity.

By articles of agreement, bearing date the 28th of October, 1805, and made between the plaintiff, George Thomas Wethered, of the one part, and the defendant, Charles Wethered, of the other part, after reciting that the plaintiff and Charles Wethered were the two only sons of George Wethered, who, it was presumed, stood seised and possessed of divers freehold and copyhold estates, and also a considerable personal estate, part of which the plaintiff, and Charles Wethered, expected to be given, devised or bequeathed to them by their said father, and in case he should die intestate, then the plaintiff and Charles Wethered, or one of them, by descent, by the statute of distribution of intestates' estates, or by surrender and the custom or customs of the manor or manors in which such of the premises as were copyhold were situate, or by some other ways or means would become entitled to such freehold and copyhold estates, and a part of the personal estate of their father, jointly with their sister or otherwise: and further reciting that it had been agreed, between the plaintiff and Charles Wethered, that such part of the real and personal estates as they or either of them should derive, or become possessed of, or entitled unto under the will of their father, or which should come to them or either of them, by descent or deed, or in any other manner whatsoever, should be divided between the plaintiff and Charles Wethered, in equal shares, first paying thereout all reasonable costs, charges and expenses which they or either of them might be put unto, in or about the premises: and further \*reciting, that it had been also agreed between the same parties that, [\*184] in case George Wethered the father, should, in his life-time, advance any sum or sums of money, to them or either of them, to place them or either of them in business, or otherwise to advance them in life, such sum or sums of money should go and be taken as part of their moiety or half part or share to arise and become paid and payable from their father in manner aforesaid; it was witnessed, that the plaintiff, for himself, his heirs, executors, administrators and assigns, did covenant and agreed with Charles Wethered, his heirs, executors, administrators and assigns, that the plaintiff, his heirs, executors, administrators or assigns, would, immediately upon the decease of his father, or within six months next after, by deed or otherwise, convey, assign or pay, unto Charles Wethered, his heirs, executors, administrators or assigns, one full moiety of all such real and personal estate as the plaintiff might become possessed of or entitled unto under the will of his father, or by descent, or otherwise from him; and that Charles Wethered, for himself, his heirs, executors, administrators and assigns, would, in like manner, by deed or other-

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 1828.—Wethered v. Wethered.
 

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wise, convey, assign or pay, unto the plaintiff, his heirs, executors, administrators or assigns, one full moiety of all such real or personal estate as he, Charles Wethered, might become possessed of or entitled to under the will of his father, or by descent or otherwise from him, so that the plaintiff or Charles Wethered should, neither of them, have, derive or receive in moneys, real or personal estate, more than the other, but each take an equal moiety of all property whatsoever which they or either of them might have or possess from their [\*185] said father, as fully and effectually, \*to all intents and purposes, as if the same had been by him given, devised or bequeathed to them, share and share alike.

By indentures of lease and release, dated the 22d and 23d days of June, 1807, being the settlement on the marriage of Charles Wethered with Mary Ann his wife, then Mary Ann Bell, and made between George Wethered, the father, of the first part, Charles Wethered of the second part, William Bell of the third part, and Mary Ann Wethered of the fourth part, George Wethered, the father, conveyed unto William Bell and his heirs, certain houses in Great Marlow, to the use (after the solemnization of the marriage) of the said George Wethered and his assigns, for his life, with remainder to the use of the defendant Charles Wethered and Mary Ann his then intended wife, their heirs and assigns for ever.

At the time of the execution of the indenture of release, George Wethered, the father, by an indenture, dated the 23d of June, 1807, in consideration of the intended marriage, leased the premises comprised in the indenture of release, to the defendant Charles Wethered and his intended wife, their executors, administrators and assigns, for the term of fifty years, if the said George Wethered should so long live at the yearly rent of 5*l*.

The marriage took place accordingly; and Charles Wethered and his wife took possession of the premises comprised in the lease, and held the same as lessces, and received the rents and profits thereof until the death of George Wethered, the father.

Besides the premises leased to Charles Wethered and his wife, [\*186] George Wethered, the father, previously to \*the marriage, advanced to Charles Wethered 300*l*. and upwards, for the purpose of putting him into business.

George Wethered, the father, by his will, bearing date the 18th of March, 1820, and duly executed and attested to pass real estate, gave unto his brother the defendant, Thomas Wethered, and John Mossenton, their heirs, executors, administrators and assigns, all his freehold and leasehold messuages or tenements, lands, hereditaments and premises; and also all his personal estate and effects, whatsoever and wheresoever, that he might die possessed of, interested in or entitled to, upon trust to sell the same, and to pay and divide the money arising from such sale, equally between the plaintiff and the testator's daughter, Ann Wethered, share and share alike: and the testator appointed Thomas Wethered and John Mossenton, trustees and executors of his will.

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The bill prayed that Charles Wethered might be compelled specifically to perform the agreement between him and the plaintiff; and that, for that purpose, an account might be taken, of all sums of money which the defendant had received from his father, since the execution of the said agreement, and the rents and profits of the premises leased to him and Mary Ann his wife; and that, upon the plaintiff paying or conveying, to the defendant Charles Wethered, one moiety of what he might be entitled to by the will of the testator, the defendant Charles Wethered might be decreed to pay to the plaintiff one moiety of what he should be found to have received from the testator, and of the rents and profits of the estate and premises previous to the death of the testator; and that the \*defendants, Charles Wethered and Mary Ann his wife, [\*187] might be decreed to convey to the plaintiff, one moiety of the estate and premises conveyed to them by the indentures of lease and release of the 22d and 23d of June, 1807.

The defendants, Charles and Mary Ann Wethered, by their answer, said that they did not believe that the testator ever knew or was ever informed of the agreement, or that, if he ever was informed or knew thereof, it was but a very short time before his decease; and that the agreement was prepared and intended by the plaintiff to defraud the testator of his parental control over the plaintiff, and of his right to dispose of his property; and that Mary Ann Wethered continued ignorant of such agreement being in existence till about twelve months after her marriage, when she casually learned there was some agreement in existence between Charles Wethered and the plaintiff; but of the nature and effect of it she was wholly ignorant, till informed of it by the bill; and that, to the best of their knowledge, information and belief, William Bell continued ignorant of the existence of any such agreement during the whole of his life; and they submitted that Mary Ann Wethered and her father William Bell, were purchasers, under the settlement, of the estates and hereditaments, as made by the three indentures, for a good and valuable consideration, namely, the marriage of the defendants, and the marriage portion of Mary Ann Wethered, and which marriage portion they said was duly paid, by William Bell, to the defendant Charles Wethered, and that the plaintiff kept the agreement concealed from Mary Ann Wethered, and as they, the defendants believed, from William Bell. And they submitted that, if the agreement was otherwise binding, the same was, \*by reason of such concealment, a fraud [\*188] on the right of Mary Ann Wethered, and upon the marriage settlement, and that the same ought not to be enforced against them. The defendants admitted that they occupied the hereditaments comprised in the lease; and that the testator, previously to their marriage, advanced, to Charles Wethered, 300*L.*, for the purpose of assisting him to engage in and carry on the business of a maltster; but that, except that sum and the estate and premises limited and leased to them as aforesaid, the testator did not at any time previous to their marriage advance or pay to Charles Wethered any sum of money, by way of gift to him or for his advancement in life. And Mary Ann Wethered

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insisted that, in case it should appear that the testator had advanced any sums of money to Charles Wethered for his advancement in life, inasmuch as the same, if any, were advanced prior to the marriage, the same could not be affected by the agreement.

Mr. *Sugden*, and Mr. *Barber*, for the plaintiff:—The question in this case is concluded by authority, *Beckley v. Newland*.(a) It is observable that, in that case, the agreement was made between persons who were not related to the testator; but the Lord Chancellor, in his judgment, puts a case precisely similar to the one now before the court. His lordship says: "Suppose there were two daughters, &c."(b) *Hobson v. Trevor*,(c) is material for the purpose of showing the principle upon which the court acts, in cases of this nature. From these authorities it is quite clear that this agreement is, in all respects, hind-

ing. The only question then is, how far has the plaintiff's right been [\*189] \*cut down by the transactions that took place after the agreement. It

cannot be represented, to the court, that the plaintiff has any equity against the wife, as she had no notice of the agreement, and as she had the legal estate. But, as respects the husband, there is no difficulty; he can have no preference over the plaintiff, and therefore, the plaintiff is entitled to every thing that he can convey. The plaintiff must submit to account for the personal estate, so as to let in the defendant Charles Wethered; but, as he has disposed of part of the estate, by procuring his father to make the settlement on his wife, he must bring into account the entire value of the fee simple, before he can take a moiety of the personal estate. For, if a father, having a power to appoint to his son, makes an appointment to his grandson, and the son joins in it, it is considered as an appointment to the son, first, and then an appointment, by the son to the grandson. There is no evidence that either Charles Wethered, or his father, was imposed upon. He must account for every thing he received in his father's life-time, the 300*l.* and the full rent of the premises comprised in the lease.

Mr. *Pepys* and Mr. *Wakefield*, for the defendants, Charles Wethered and his wife:—The cases that have been referred to were overruled by Lord Eldon, C., in the case of *Harwood v. Tooke*.(d) It is discretionary in the court to compel or refuse the specific performance of an agreement. Here are two sons, not knowing what disposition their father may make of his property, who enter into an underhand agreement, for the purpose of defeating his [\*190] intentions, \*and who thereby protect themselves against the consequences of their misconduct, and bid defiance to parental authority. The court must think that this contract is pregnant with mischief, and will not assist the scheme of these two sons. The only case that applies to the present one, is *Beckley v. Newland*. In *Hobson v. Trevor*, the party was dealing with his expectations; but that does not, of necessity, defeat the parental authority.

(a) 2 P. W. 182.

(b) See *ibid.* 184.

(c) 2 P. W. 191.

(d) 1 Madd. Prin. and Prac. 549. See a note of this case, post. 192. Lord Eldon granted an injunction in the case cited, but dismissed the bill at the hearing.

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The former case is confined to what the testator might leave to the two parties ; but here the principle of the case is sought to be extended to the 300*l.* which the father, in his life-time, and more than twenty years ago, gave to his son Charles. If the court should be of opinion that *Beckley v. Newland* is still the law of the court, it will not extend it so as to interfere with what the father might do in his life-time. The contract is immediate ; then why was Charles Wethered permitted to retain the whole of the 300*l.* He was advanced, and put into possession of the property, the subject of the lease, more than twenty years ago. Immediately on the lease being executed, the plaintiff became entitled to a moiety of that property ; then how came he not to assert his right to it at that time ? If he then neglected to prefer his claim, the court will not permit him to assert it now :—[The Vice-Chancellor :—Does it appear that the plaintiff knew that his brother had received the 300*l.*?]—From the nature of the transaction, it is clear that the advance must have been known to the family.

The recital in the agreement is more extensive than the operative part, which, there is some ground for contending, does not embrace advances made by the father in his life-time. But, assuming that the parties did \*intend that what the father advanced in his life-time, should be divided, [\*191] there is no authority for giving effect to that intention. Now it is not pretended that Charles Wethered took anything under the will. The whole that he became entitled to (except the 300*l.*) was under the settlement. Litt. Sect. 291. *Back v. Andrews*, (e) *Green v. King*, (f) *Doe v. Parratt*. (g) Now it is admitted that what the wife has, cannot be touched ; and if these cases be law, she has the whole.

Mr. Roupell, for the defendant Thomas Wethered.

Mr. Barber, in reply :—The court may appoint a receiver during the continuance of the husband's interest, whatever that may be. This case goes further than *Beckley v. Newland* ; because the agreement, in this case, is more extensive than it was in that case. The plaintiff has not been guilty of any *laches* in asserting his right, as the agreement could not be carried into effect until after the father's death.

The VICE-CHANCELLOR, after stating the case of *Harwood v. Tooke*, said that the doctrine laid down in *Beckley v. Newland* was so far from being overruled by the decision in *Harwood v. Tooke*, that he was bound to consider that it was upheld by that decision ; that the notion that agreements similar to the one in question, were contrary to the policy of the law, was not supported by the principles of law applicable to such cases ; because it was quite clear that, if a testator \*meant that his devisee should have the per- [\*192] sonal enjoyment of his bounty, he might so devise as to stint the enjoyment of the devisee, and restrain him from aliening the subject of his gift : but that, if the testator did not so devise, it must be intended that he meant

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that his devisee should not be so stinted, but should have the full enjoyment of the property, and that it should be liable to all his antecedent debts, and all his antecedent contracts; and, therefore, that where there was a general devise, it gave the devisee the property liable to be incumbered in any way that the devisee might think proper, either before or after he took it.

A specific performance of the agreement was decreed according to the prayer of the bill.<sup>[1]</sup>

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WILLIAM TOOKE HARWOOD, Esq. v. JOHN HORNE TOOKE, and SIR FRANCIS BURDETT, Bart.

1809, 19th May; and 1812, 4th February.—*Agreement.*—*Public policy.*

An agreement between two persons, having expectations from a third, to divide equally whatever he might leave them, is valid.

THE plaintiff was nephew and heir at law, and also one of the next of kin of William Tooke, Esq. a gentleman of large property. The defendant Tooke was not at all related to, but was an intimate friend of that gentleman, and he and the plaintiff having expectations from him, agreed, by parol, to share equally between them what Mr. W. Tooke might leave them. In 1802 Mr. W. Tooke died, having left a much larger portion of his property to the plaintiff than to the defendant J. H. Tooke. The defendant, not wishing to press upon the plaintiff to the extent of their engagement, proposed [\*193] \*to accept 4,000*l.* in satisfaction of his claims under the agreement, and the plaintiff gave him a promissory note for that sum. The defendant afterwards endorsed the note to Sir Francis Burdett, as the consideration for the purchase of an annuity. The bill prayed that the note might be declared to have been unduly obtained from the plaintiff, and without good or valuable consideration, and that it might be delivered up to be cancelled; and that, in the mean time, the defendants might be restrained from using, apply-

[1] It seems that a contract under seal, between two brothers, by which one of them for a fair and valuable consideration agrees that when he shall obtain possession of land, expected to be devised to him by their father, he will convey it to the other, is not *contra bonos mores*, and he may support an action of covenant at law, or it may be enforced specifically in a court of equity. *Lewis v. Madison*, 1 Mun. 303. During the progress of a rail road bill through parliament, the promoters of the bill agreed with an owner of land on the intended line, that if the bill should pass, they would endeavor in the next session to obtain the sanction of parliament to a deviation of the line. A question as to the legality of the agreement arose, but was not decided; but it was held that the court would not order an instrument to be delivered up, on the ground of illegality appearing on the face of the instrument itself. *Simpson v. Lord Howden*, 3 Myl. & Cr. 97. An agreement between two persons not to bid against each other at a sale under an execution, or other auction sale, but that one was to bid, and divide with the other, is against public policy and void. *Jones v. Caswell*, 3 Johns. Cas. 29. *Dootin v. Ward*, 6 Johns. Rep. 194. *Wilbur v. Howe*, 8 Johns. Rep. 444. See further *Knye v. Moore*, 2 Sim. & Sta. 260. *Money v. McLeod*, id. 501. *Elworthy v. Bird*, id. 372.

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1828.—Thompson v. Powles.

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ing, negotiating or paying away, or bringing an action against the plaintiff respecting the note.

An injunction was granted, and the amount of the note ordered to be paid into court [1]

On the 19th of May, 1809, the cause was heard, and the money was ordered to be repaid to Sir Francis Burdett, and the bill was dismissed, as against Sir Francis Burdett with costs, and, as against J. H. Tooke without costs.

Reg. Lib. A. 1808, fol. 667.

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The plaintiff having presented a petition of rehearing, the cause was reheard on the 11th May, 1811, in the presence of counsel for the plaintiff, but no one appeared for the defendants; and on the 4th of February, 1812, the decree was affirmed.

Reg. Lib. A. 1811, fol. 475.

The petition of rehearing was signed by Sir *Samuel Romilly*, Mr. *Hart*, and Mr. *Bell*.

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\*THOMPSON v. POWLES.

[\*194]

1828; 2d February.—*Usury*.—*Vendor and purchaser*.—*Public policy*.

A revolted Colony of Spain, not recognized as an independent state by Great Britain, executed bonds, at six per cent. interest, as securities for a loan. P., acting in collusion with B., a holder of the bonds in England, by falsely representing that he had purchased some of them, induced the plaintiff to become a purchaser; held, on demurrer, that the bonds were not usurious, as it did not appear, by the bill, that the contract for the loan was made. or the amount of it to be paid in this country; that P. and B. would have been answerable to the plaintiff for losses sustained upon his purchase, but that, as the original contract was made with a government not acknowledged by Great Britain, the court could not relieve him.

THE bill stated that, in the month of August, 1825, the defendants David Barclay, Charles Herring, the elder, Christopher Richardson, Richard Jaffray, John Potter, and Charles Herring, the younger, carried on business, in co-partnership together, as merchants, in the city of London, under the firm of "Barclay, Herring, Richardson & Co.;" that, in or shortly before the said month of August, the defendants were in the possession of certificates of obligation of the government of the Federal Republic of Central America, or Guatemala, whereby the said government agreed to pay certain sums of money, mentioned in the said obligation, to the holders thereof; that in the same month John Diston Powles and Alfred William Powles, the two other defendants, carried on business, in co-partnership together, under the firm of

[1] As to the right of parties to deal with an expectancy; see *Lyde v. Mynn*, 1 Myl & K. 683. Supporting the principle of this and the preceding case. *Douglase v. Russell*, 4 Sim. 594. *Alexander v. Duke of Wellington*, 2 Russ. & M. 35.



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"J. & A. Powles & Co.:" that, in the said month of August, Barclay, Herring, Richardson & Co., announced, by public advertisement, that, on the 22d day of that month, they should proceed to sell certificates of the obligations of the government of the said Republic of Guatemala, to the amount of 1,428,571*l.* 8*s.*, and that they were ready to receive tenders for the same, pursuant to a printed form prepared by them and specified in such advertisement: that, shortly after such advertisement, the firm of J. & A. [195] Powles & Co., in pursuance of a secret \*arrangement between them and Barclay & Co., sent to the latter firm a tender in the form prescribed by such advertisement, and thereby offered to purchase the said certificates of obligation of the government of the Federal Republic of Central America, to the amount of 1,428,571*l.* 8*s.*, at the rate of 68*l.* per cent. and undertook to pay for the same in the following manner, namely, 15*l.* per cent. on the nominal amount of the certificates, on the acceptance of their offer, and the remainder of the purchase money, by equal instalments, on the following days; viz. on the 22d of September, 1825, 7*l.* 11*s.* 5*d.* per cent.; on the 21st of October, 7*l.* 11*s.* 5*d.* per cent.; on the 22d of November, 1825, &c. &c. and the last instalment on the 22d of March, 1826. And, according to the terms of the said tender, on payment of the last instalment, the certificates of obligation were to be delivered to the contractors, and discount for prompt payment was to be allowed at the rate of 3*l.* per cent. per annum, and the interest of the certificates of obligation was to commence from the first of August, 1825; and, in case of failure of payment of any one of the instalments, all the preceding payments were to become forfeited, and Messrs. Barclay & Co. were to be at liberty to resell the certificates of obligation: that the tender on the part of Powles & Co., was accepted by Barclay & Co. under such secret arrangement as is hereinafter mentioned; and it was afterwards publicly announced that Powles & Co. had contracted for the said loan, and various advertisements, and other public notices were issued, in all of which the two firms were represented as distinct parties to the transaction, Messrs. Barclay & Co. being represented as the agents for the sale of the certificates, and Messrs. Powles & Co. as the contractors for the [196] purchase \*thereof: that Powles & Co., being intimate friends of the plaintiff, informed him that they had just entered into a contract to take the Guatemala loan, and that they fully expected it would bear a premium, and, therefore they strongly advised the plaintiff to purchase of them a portion of such loan; and, upon such representations, the plaintiff was induced to agree to purchase of them, and accordingly did agree to purchase of them such certificates or special obligations, for 10,000*l.* at the price of 73*l.* per cent. That the plaintiff accordingly, on the 27th of August, 1825, paid to Powles & Co. the first instalment of 10*l.* per cent. on the account of the certificates agreed to be purchased by him, such instalment amounting to 1,000*l.*; and thereupon, they delivered to him twenty scrip receipts or vouchers for such payment, such scrip receipts being for the instalment on special obliga-

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tions or certificates for 500*l.* which were in the following form: "Six per cent. loan for the Federal Republic of Central America, 500*l.* No. 819. received the sum of 50*l.*, being the first instalment of 10*l.* per cent. on 500*l.* special obligations, purchased by us from the agents of the Federal Republic of Central America; and we hereby agree to deliver, to the bearer, special obligations of the said Federal Republic of Central America, to that amount, in the form in which they have been contracted to be delivered to us, bearing interest from the 1st inst., on return of the receipt, and on payment of the following sums, on or before the dates hereinafter specified, viz. on 18th October, 10*l.* per cent. on 500*l.* being 50*l.*; 10th November, 5*l.*, 25*l.*; 12th January, 10*l.*, 50*l.*; 9th February, 5*l.* with interest at the rate of 5*l.* per cent. from the 1st of January, 25*l.* 0*s.* 6*d.*; 9th March, \*5*l.*, 25*l.* 2*s.* 6*d.*; 13th April, [\*197] 10*l.*, 50*l.* 9*s.* 9*d.*; 11th May, 5*l.*, 25*l.* 6*s.* 9*d.*; 13th July, 5*l.*, 25*l.* 11*s.* 1*d.*; 10th August, 8*l.*, 41*l.* 4*s.* 10*d.*, 317*l.* 11*s.* 5*d.* In default of payment of any of the above sums, the payments before made are to be forfeited, and the engagement on our part is to be void. London, 27th August, 1825. J. & A. Powles & Co. Entered, A. H." And such scrip receipts contained printed forms of receipts for each instalment, to be signed, by Powles & Co., when, and as such instalments should respectively be paid: That the plaintiff regularly paid to Powles & Co. the second, third, fourth and fifth instalments upon the purchase money for the certificates, making the sum paid by him on account thereof, 4000*l.*; and receipts for such instalments were accordingly signed by Powles & Co. upon the scrip receipts before mentioned; that all the payments which had been made by the plaintiff were paid by him, by the desire of Powles & Co., into the house or firm of Barclay & Co.: that, at the time when the sixth instalment became due, the plaintiff offered to pay the same, but was prevented from so doing by Powles & Co. who, with the view, as the plaintiff afterwards discovered, of making him commit a forfeiture of the instalments already paid, advised him not to make any more payments, saying that there was a disagreement between Barclay & Co. and the government of Guatemala, respecting the loan, and that it would not be expedient, or, perhaps, safe to make any further payment, to Barclay & Co., in respect of the certificates of obligation, until such difference should be settled; and, under these circumstances, the plaintiff, although at that time perfectly ready to make such payment, refrained from so doing: that the plaintiff had then \*recently discovered that the representations [\*198] made by Barclay & Co. and Powles & Co. with respect to the nature of the contract between them, were untrue, and that, instead of Barclay & Co. having sold the certificates by tender to the highest bidder, as they professed to do, it had been, and was privately arranged between Barclay & Co. and Powles & Co., that the latter should become the nominal contractors for, and purchasers of the certificates, at the price of 68*l.* per cent., but that Barclay & Co. should be, clandestinely, partners with them in the transaction, and should have some larger interest therein than the Messrs. Powles, and should, in fact,

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themselves be the purchasers of the certificates, to the extent of 100,000*l.*, but that such agreement or arrangement and interest, should be concealed, both from the parties for whom Barclay & Co. were agents for the sale of the certificates, and from the public, or persons who were to be invited by Powles & Co. to purchase such certificates: that such arrangement was a fraud both upon the Guatemala government, for whom Barclay & Co. were agents in the transaction, and upon the persons who purchased such certificates in ignorance thereof, and, amongst others, upon the plaintiff, but that such arrangement was acted upon, and the whole of the certificates were sold and disposed of by Barclay & Co. and Powles & Co., in the names of the latter persons, and such certificates were sold, to the amount of 400,000*l.* at 72*l.* per cent., and the remainder, at 73*l.* per cent., and many of the instalments upon such sums were paid, by the purchasers of such certificates, to Powles & Co. and Barclay & Co.; and, by such means, the latter firm received moneys to the amount of several hundred thousand pounds; that Barclay & Co. and Powles & Co. [\*199] did not remit the moneys which they so received, or any moneys, to the Guatemala government, or the persons for whom they were agents in these transactions, and that, in fact, they divided such moneys amongst themselves; and the Guatemala government, having discovered the fraud which was so practised upon them by Barclay & Co. and Powles & Co., refused to adopt or be bound by the said arrangement, or to pay any of the special obligations or certificates so placed in the hands of Barclay & Co. as aforesaid: that, under the circumstances aforesaid, the plaintiff, and the other purchasers of the certificates, having declined to pay any further instalments on account of their purchase moneys, Barclay and Co. and Powles & Co. had declared all the deposits and instalments already paid to be forfeited, and had converted all such moneys to their own use: that, under the circumstances aforesaid, the plaintiff was advised that he was entitled to call upon Barclay & Co. and Powles & Co. to pay to him the moneys he had so advanced and paid for the purchase of the certificates, together with interest thereon, at the rate of 5*l.* per cent., from the date of each advance.

The bill charged that, in fact, at the time when the sixth instalment became due, the plaintiff was ready and willing to pay the same, but was prevented from so doing by the advice of Powles & Co., which advice was given by them in collusion with Barclay & Co.; and that, in fact, a fraud was practiced upon him by the defendants, in respect of the purchase of the certificates, by representing the contract, for the purchase of the certificates by Powles & Co., as a *bona fide* transaction, and by concealing, from the plaintiff, the fact [\*200] that Barclay & Co. were, in fact, at once the buyers and sellers of the shares: that whilst Barclay & Co. were publicly acting as the agents for the sale of the certificates, and professing to offer the same to a fair competition, and to make, with Powles & Co. a contract of sale to them, it had been planned and arranged between these parties, that, although Powles & Co. should ostensibly appear as the contractors for the loan, yet that they

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and Barclay & Co. should be partners in the loan ; or, if not, that there was some agreement, arrangement or understanding between Powles & Co. and Barclay & Co. that the last mentioned firm should be concerned in and have a joint interest, or some other interest, with Powles & Co. in the purchase of the certificates, or should be, in some manner, or to some extent, interested in the profit or loss on the transaction : that, if Barclay & Co. ever acted as such agents, they had never made any remittances to the Guatemala government, on account of the sale of the certificates, or that the sums remitted by them to the government, or paid on account thereof, had not been nearly to the amount of the moneys received by them on account of the matters aforesaid ; that the government, in consequence of the fraud practiced upon them by the defendants, had rescinded the said transaction, and had refused to abide by the sale of the obligations so made as aforesaid, and had publicly announced that they would not pay such obligations ; and that, in fact, such obligations had been returned, by the defendants, to the government ; and that the contract with the government was at an end, and could not be performed, and that the defendants could not deliver to the plaintiff the certificates which he contracted to purchase, if, under the circumstances, the plaintiff was bound to accept the same.

\*The bill prayed that the defendants respectively, might be declared [\*201] to be liable to the plaintiff under the circumstances before mentioned, for the amount of the several sums thereinbefore mentioned to have been paid by him for instalments upon his purchase money for the certificates or special obligations ; and that they might be decreed to pay the same to him, with interest at 5l. per cent per annum, from the date of each payment.

The defendants, the Messrs. Powles, demurred generally to the bill.

Mr. *Pepys*, and Mr. *Jacob*, in support of the demurrer :—The bill, in this case, is filed by a person who describes himself as a subscriber to the Guatemala loan, to recover the amount of the moneys paid by him. He says that he has paid five of the instalments, but has declined to pay the remaining ones, because the Guatemala government has discovered the transaction which he states to have taken place between Powles & Co., and Barclay & Co., and have refused to pay the bonds, or to let them be delivered out. If that statement had stood alone, if the Guatemala government had improperly refused to acknowledge their bonds, it would not have given the plaintiff any claim against the defendants, who are merely the instruments of that government. But the plaintiff says that the defendants, by their conduct, gave the Guatemala government a right to repudiate their contract. This depends upon the question, whether the agents of the government did so conduct themselves as to authorize the government to repudiate their contract. The bill

\*begins with alleging that Barclay & Co. were in possession of these [\*202] certificates, but does not say in what character they held them. It then states that Barclay & Co. were agents for the sale of the certificates, and that the arrangement between them and the other defendants was to be

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concealed from the parties for whom they are agents, without saying for whom they were agents. The bill next alleges that neither Barclay & Co. nor Powles & Co. remitted the moneys they had received, to the Guatemala government, or, the persons for whom they were agents. So that the fact of their being agents of the government is spoken of doubtfully. Again, in the charging part of the bill, it is averred that the defendants allege that Barclay & Co., in the sale of the certificates, acted as the agents of the Guatemala government; and then the contrary is charged; and that, if Barclay & Co. did ever act as such agents, they never made any remittances to that government. It appears, therefore, from the whole of the bill, to be doubtful whether Barclay & Co. were or were not the agents of the government; and yet it is upon this agency that the whole case must turn; for, if Barclay & Co. were not such agents, *non constat* that the government had any right to repudiate their contract.

The whole of this transaction arises out of a loan to a government which is not recognized by this country and which is still part of the dominions of the King of Spain. It appears, from a variety of cases, that such a trans- [\*203] action is illegal. *Jones v. Kinder*; (a) in which Lord Eldon, C., though he did not formally decide the point, strongly intimated an opinion that such a transaction could not be recognized in the courts of this country. *De Witz v. Hendricks*. (b) *Yrisarri v. Clement*. (c) The courts of this country take notice of those public acts which are recited in treaties. Now, in a treaty between Spain and Great Britain, the inhabitants of this colony are described as revolted subjects. In *Bire v. Thompson*. (d) a motion for an injunction was made before Lord Eldon, C., and was refused, because the Lord Chancellor could not take notice of the Republic of Colombia. But it is not merely that the courts do not recognize these states, but contracts for supplying them with money are actually illegal. It must be looked at as a question of international law. In the American war, Great Britain declared war against France and other countries, on the ground of interference between her and her colonies. In *Hennings v. Rothschild*, (e) Best, C. J. says: "whoever looks into the law may find it very doubtful, whether any person holding allegiance to the king of this country, can, without the king's consent, borrow money or lend money to a foreign prince."

There is another objection, which appears on the face of the bill. These bonds were to bear interest at six per cent, and were purchased by the plaintiff at seventy-two per cent, so that he was to receive 6*l.* for interest upon [\*204] 72*l.*; there can then be no doubt that the contract was of a usurious nature. Barclay & Co. were the agents of the Guatemala government,

(a) When this case was argued there was no printed report of the decision above referred to: it is now reported under the name of *Jones v. Garcia del Rio*, 1 Turn. & Russ. 297.

(b) 2 Bing. 314.

(c) 2 Carr. & Payne, N. P. C. 223.; and 3 Bing. 432.

(d) Not reported. See the judgment in the next case.

(e) 4 Bing. 315, 335; 9 Barn. & Cress. 470; and see *Yrisarri v. Clement*, ubi sup.

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or else the whole case falls to the ground. The contract for raising the money was made in England, and the whole transaction was an English one. It is impossible to represent it as a sale of bonds, for the business was transacted by the agents themselves; and it therefore falls within our usury laws.

But, independently of this, the nature of the relief prayed by the bill, is to be considered. The plaintiff alleges that he has been defrauded, and comes to this court for the same relief as a court of law would afford him. The proper remedy is by an action for money had and received. Lord Redesdale treats, indeed, of cases where equity will relieve against fraud; (*f*) but those are only where the defendant has an advantage in a proceeding at law, which it is against conscience that he should use. Thus, if a defendant has got a deed which he can plead at law, a bill may be filed: but not where the plaintiff's demand is a mere money demand. If this bill is sustained, then a bill would lie to try a horse cause in this court. There are two cases which may be said to be authorities for granting the relief sought by the bill, namely, *Colt v. Woollaston*, (*g*) and *Green v. Barrett*. (*h*) These cases do not lay it down, as a general principle, that, in all cases of fraud, a bill in equity would lie, instead of an action for money had and received. In those cases, it is represented that the whole transaction was, *ab origine*, fraudulent. It is not said, here, that the defendants had no intention of sending the money to \*Guatemala; [\*205] but that, subsequently to the plaintiff paying his money, there has been a disaffirmance of the contract, by the Guatemala government, which has given the plaintiff a right of suit.

Mr. *Bickersteth*, and Mr. *Pemberton*, in support of the bill:—The allegations of this bill (which, as a demurrer has been put in, must be taken to be true) amount to a gross fraud.

The first objection made to the bill, is that it is not distinctly charged that *Barclay & Co.* were the agents of the Guatemala government. The case made, is not that the Guatemala government entered into a contract with us through their agents, but that, whether the defendants were agents or not, they have so conducted themselves, that their contract cannot be enforced. If the defendants have been guilty of a fraud, it is immaterial whether they were or were not the agents of this government. All that is material is that they induced the plaintiff to put money into their hands, under a representation that was false. If they were not the agents, they committed another fraud. The plaintiff says that *Powles & Co.* represented to him that they had purchased these certificates at 68*l.* per cent, whereas there had, in fact, been no such purchase. This representation necessarily influenced the plaintiff as to the price which he was to pay; and he was induced, by that representation, to believe that 72*l.* per cent. was a fair price for him to give. A contract founded on such misrepresentation, is one which a court of equity would set aside. The plaintiff next says that *Powles & Co.* advised him to with-

(*f*) See Treat. Plead. 103.(*g*) 2 P. W. 154.(*h*) Ante, 1st vol. 45.

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[\*206] hold payment \*of the sixth instalment, to induce him to commit a forfeiture of the moneys he had already paid. This alone would be sufficient to support the bill, and to justify the court in saying that the defendants should not avail themselves of a forfeiture caused by their own fraud. The equity of the case is not that the fraud was practised upon the Guatemala government, but upon the plaintiff. If the defendants have, as is alleged, put it out of their own power to perform their contract, it becomes immaterial whether they were the agents of the government or not, or whether there has or has not been a fraud committed, as between themselves and their employers.

The next objection is that the proper remedy, in this case, is an action for money had and received. But that point is settled by *Colt v. Woollaston*, and *Green v. Barrett*. In the former of those cases, the M. R. says; "It is no objection that the parties have their remedy at law, and may bring an action for moneys had and received for the plaintiff's own use; for, in cases of fraud, the court of equity has a concurrent jurisdiction with the common law, matter of fraud being the great subject of relief here." This case is precisely in point, and has never been called in question; and there were, there, no bonds or other instruments to be delivered up. It is clear, that in *Green v. Barrett*, an action for money had and received, might have been brought, and the express objection was taken: but Sir John Leach, V. C. decided upon the authority of *Colt v. Woollaston*: the second objection therefore is entirely disposed of. Besides, the action for money had and received is an equitable action, and courts of law have assumed a jurisdiction that originally

[\*207] belonged to \*courts of equity. But here there has been collusion between Barclay & Co. and Powles & Co., and the plaintiff might, perhaps, recover at law against Powles & Co., who have got his money, but could not recover against Barclay & Co.: now courts of equity say that all parties to a fraud shall be answerable for it.

The next objection that is made in this case, is that the transaction between Barclay & Co. and the Guatemala government, is one which the courts of this country will not recognize. For the purposes of this case, it is immaterial whether there was or was not any such government as that of Guatemala. Here the transactions with that government are perfectly collateral to the case. This is not a bill to enforce a contract between the Guatemala government and the plaintiff: in point of fact there has never been any such contract. It is immaterial to the plaintiff's case whether there was any such state in existence or not. All that he says, is that the defendants represented to him that there was such a government, and, by false pretences, got possession of his property. He does not ask of the court to recognize that government. The recognition of it is not necessary for the purpose of a decree being made for the plaintiff. The only thing that he shows, is that the alleged existence of this government was the instrument which the defendants used to commit this fraud. Upon what ground, however, is the court to presume that this is a revolted province now in arms against Spain, or that it ever was part of the Span-

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ish colonies ; or, if it was, that it has not been recognized, by Great Britain, as an independent state ? But, supposing \*the contract be- [\*208] tween Barclay & Co. and the Guatemala government was illegal, that does not effect a derivative contract between two individuals in this country. Can Powles & Co. be allowed to say that, because, as between themselves and the Guatemala government, the contract was illegal, the plaintiff shall not recover back the money that he has paid. He does not attempt to enforce that contract, and to have the securities delivered to him, but, to be repaid his money. But, supposing the contract between Powles & Co. and the plaintiff to be illegal, no considerations of public policy ought to prevent his rescinding it and recovering his money. *Yrisarri v. Clement*, was a case of libel ; and there the loan was made to a nation at war.

The last objection is that this transaction is usurious. If this contract is usurious, then every contract for the purchase or sale of foreign stock is usurious. It is nothing more than the purchase of a security, and is binding in that country only in which it is to take effect. The purchaser cannot avail himself of it to obtain payment, except in a foreign country ; and it does not admit of being questioned, that bonds made by a foreign power may be sold here for any price that persons may be willing to give for them.

Mr. *Pepys*, in reply :—There is no allegation in the bill that the defendants were acting as the agents of the Guatemala government ; but every instance of fraud imputed to them, depends upon their holding that character. The plaintiff says that the loss he sustained was caused by the \*govern- [\*209] ment refusing to ratify their contract. If Powles & Co. were not the agents of the government, they are not responsible for the loss, as they were no parties to that which led to the disavowal of the contract ; they were not participators in any fraud upon the plaintiff ; but prevented him from continuing to pay the instalments, which he would otherwise have lost. The plaintiff having purchased these certificates, has become a creditor of the country, and has made a direct advance of money to a government which Great Britain has not recognized, and which is in a state of hostility with Spain, the mother country, which is an ally of Great Britain. How then can the plaintiff say that he has not entered into an illegal contract ? The cases uniformly decide that if parties enter into an illegal contract, the courts will assist neither party, but will leave the matter where they found it. It is no where stated that the plaintiff was influenced by the price that Powles & Co. represented that they had agreed to give for the securities.

The next point is equally clear, I mean, that this transaction is within 12 Ann. st. 2, c. 16, as being a contract for a loan at six per cent. made in this country. What was the state of the law in the interval between the passing of that statute and the 14 G. 3, c. 79, appears from *Stapleton v. Conway*.(i) The 5th sect. of the latter act contains a legislative recognition that securities



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bearing a higher interest than five per cent. are within the 12th Ann, except where they are excepted by 14 G. 3; *Phipps v. Earl of Anglesea*,<sup>(k)</sup> [\*210] *Dewar v. Span*.<sup>(l)</sup> It is said that, if this contract is \*held to be usurious, it will render void all contracts for foreign loans, at a higher rate of interest than five per cent. To prevent this, parties who have entered into treaties for such loans, have gone into foreign countries to complete their contracts. The defendants were in possession of the certificates which they proposed to sell. The transaction therefore was not a mere bubble, as in *Colt v. Woollaston*, and *Green v. Barrett*.

Mr. *Bickersteth* observed upon the cases that had been cited in the reply, and said that not one of them approached to a case like the present; that this was not a contract entered into between parties residing in this country; but that payment was to be made, and all the other acts of the obligation were to be done abroad: that, in *Stapleton v. Conway*, there was no contract as to the rate of interest: that, in *Dewar v. Span*, both the obligor and obligee were residing in England: that, if the bonds had been the bonds of Powles and Barclay, they would have been usurious; but that they were the agents of the obligor abroad, who had entered into the obligation abroad.

The VICE-CHANCELLOR:—It appears to me that there is considerable difficulty, on the face of the bill, in understanding what was the nature of the things to be purchased; for, though it might be collected, from some parts of the bill, that the certificates and obligations mean the same thing; yet some of the passages, certainly, put them in direct opposition to each other. When I read the bill, it seemed to me that the certificates were mentioned as distinct from the obligations: but I should be very sorry to determine the case on any point so extremely minute.

[\*211] \*With respect to the question of usury, in order to hold the contract to be usurious, it must appear that the contract was made here, and that the consideration for it was to be paid here. It should appear, at least, that the payment was not to be made abroad; for, if it was to be made abroad, it would not be usurious.[1] All that is stated about the nature of the bonds,

(k) 1. P. W. 696.

(l) 3 T. R. 425.

[1] Vide *Pratt v. Adams*, 7 Paige, 616. *Andrews v. Pond*, 13 Peters, 65. As late as February, 1840, the question arose in England, whether, on a bill of exchange drawn and accepted in Paris, payable in England, interest was to be allowed according to the French or English law. The question appears to have been solemnly argued and received a solemn decision, in accordance with the principle that the effect of a contract is to be determined by the law of the place in which it is to be performed. A principle so familiar, that no advocate in any of our courts would venture either to call it in question, or would think it necessary to adduce an authority in support of it. Mr. J. Story's *Conflict of Laws* was, on this, as well as many other recent occasions, cited at the bar. The court decided that the rate of interest was to be governed, not by the French, but by the English law. Lord Langdale says, "It would seem that cases of this description have frequently come under the consideration of courts in other countries, and more particularly in America; and that it has been held in such cases, the mode of payment and the consequences of non-payment, are to be governed by the law of the country in which the payment was contracted to be made. It is singular, that no

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is what you collect from that receipt, which is headed: "Six per cent. loan." But there is nothing to show that the payment was to be made here; and I cannot intend that it was to be made here, because that would be making an intendment merely to bring the case within the operation of a penal statute; and, therefore, I think that I cannot decide the question on the ground of usury.

Next with respect to the matter of fraud. This it is said consisted in the representation, stated to have been made, by Messrs. Powles, to the plaintiff, that they had just entered into a contract to take the Guatemala loan, and that they fully expected it would bear a premium, and, therefore, strongly advised the plaintiff to purchase of them a portion of that loan. The circumstance that Powles & Co. had become the contractors for the loan, might, of itself, have been an inducement to other persons to purchase the bonds; and I must infer, from the frame of the bill, that this representation did so operate on the mind of the plaintiff, as to induce him to become a purchaser of these bonds, though he would not have become a purchaser, provided the fact had been that Messrs. Powles had not been the contractors for the loan.

The other matter of fraud which the plaintiff's counsel rely upon, is that Messrs. Barclay & Co. so \*dealt with these bonds as to absolve [\*212] the government from their obligation to deliver the certificates. This is not, in my mind, a fraud: for I do not collect, from this bill, that the mode in which Messrs. Powles and Barclay dealt, taking it even as it is stated, would absolve the government from their obligation to deliver the certificates. All that would result, from the course of dealing which was pursued between Messrs. Barclay and Powles, would be this, that the government would have a right to call on Messrs. Barclay to pay the whole amount which they received, namely 73*l.* per cent. For Messrs. Barclay & Co. were the agents of the government to sell these obligations, and; therefore, they could not, fairly, give their government credit for 68*l.* per cent. only, when, in point of fact, the sale between themselves and Powles & Co. at 68*l.* per cent., was merely fictitious, and Powles & Co., by virtue of that fictitious sale, received 73*l.* per cent. from the real purchaser. I think, therefore, that the government are not absolved from the performance of their contract; but that they would only have a right to recover the 73*l.* per cent. I do not, therefore, consider that as a case of fraud. But it appears to me, on the first ground, if it had stood alone, that it would have been a fraud; and I think that the court would have relieved the plaintiff.

But there is this further consideration: that this is represented to have been a contract, by the plaintiff, to purchase the obligations of persons who were stated to be the government of the Federal Republic of Central America. I confess that, after all I have heard fall, from the mouth of Lord Eldon, on the

case has been found in which the point has been directly determined in the English tribunals; but the cases which have been cited show that the courts in England have decided upon principles which do not in any degree conflict with the principles upon which the courts in other countries have proceeded." *Cooper v. The Earl of Waldegrave*, 2 Beav. 282.

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subject of persons representing themselves to be governments of foreign [\*213] countries, \*which this country had not acknowledged to be governments, and which the courts cannot acknowledge them to be, till the government of the country has recognized them to be so,[1] it does appear to me that this is a contract entered into by the plaintiff for the purpose of purchasing that which, by the law of the land, he could not purchase. I think that the contract, being to purchase securities from these persons, who, as the plaintiff says, were the government of Guatemala, cannot be considered as being a contract which this court ought to sanction. The whole case being founded on that, I do not think that I could give relief to the party, who builds his case for relief entirely on a transaction originating in such a manner; and it appears to me that, on that ground, I must allow this demurrer.(m)

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 TAYLOR V. BARCLAY.(a)

1828; 12th and 19th November.—*Pleading*.—*Public policy*.

To prevent a demurrer to a bill, it was falsely alleged in it that a revolted colony of Spain had been recognized by Great Britain as an independent state; the court is bound to know, judicially, that the allegation is false, and not to give it the intended effect.

THE bill in this prayed a discovery only. It alleged that, in August, 1825, Barclay & Co. representing themselves to be the agents of the government of the Federal Republic of Central America, which was a sovereign and independent state, recognized and treated as such by his majesty the king of these realms, and in a state of amity with this country, publicly announced [\*214] their intention of raising a loan, for the said republic, by \*open competition, to be paid by instalments: that Barclay & Co. proposed to raise such loan upon the security of bonds or special obligations of the said government; and represented that the bonds, or special obligations were not to be delivered, in the first instance, to the subscribers to the loan; but that certificates of obligations, purporting to be issued by the said government, should be given to them on payment of the first instalment, and that, on payment of the last instalment, and on production of the certificates to the then contractor for, or buyer of the loan, special obligations of the government would be delivered to the holders of the certificates; that it was afterwards publicly advertised that Powles & Co. were the highest bidders, and had contracted for the loan; that, in all the advertisements, the two firms were represented as distinct parties to the transaction, and as having no common or joint-interest therein: that the plaintiff was induced, by Messrs. Powles, to purchase of

(m) See the next case.

(a) This suit was instituted against the same defendants as *Thompson v. Powles*, and nearly resembled that case in its circumstances; for which reason it was thought advisable to report it here.

[1] Vide *Williams v. Suffolk Ins. Co.*, 18 Peters, 415. *The Columbian Government v. Rothchild*, 1 Sim. 102, 104.

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them seventeen of the certificates, and afterwards duly paid, by the direction of Powles & Co., five of the instalments of the purchase money, into a banking-house, to the credit and on the account of Barclay & Co.; whereupon Powles & Co. signed receipts upon the certificates: that the plaintiff, by the advice of Powles & Co. forebore to pay the sixth instalment: that such advice was given, as the plaintiff afterwards discovered, with the view of making the plaintiff commit a forfeiture of the former instalments; that Barclay & Co. were not authorized by the government (as the plaintiff had also since discovered) to make the said contract, or to bind the said government thereby; and that the same was well known to Powles & Co.; that the plaintiff had also recently discovered that, instead of Barclay & Co. having publicly sold the \*certificates to the highest bidder, it had been clandestinely arranged, [\*215] between them and Powles & Co., that the latter should be the nominal contractors for the loan, and purchasers of the certificates; and that Barclay & Co. should be secretly partners with them in the transaction: that the representations, made by Barclay & Co., that they were authorized to make the contract, and that they had sold the certificates, by public sale, to Powles & Co., were made in order to induce persons to purchase the certificates at higher prices than they would have given, if they had known the real nature of the transaction; and that such conduct was a fraud upon the plaintiff and the other persons who had purchased the certificates in ignorance thereof: that the plaintiff was about to commence an action against the defendants, to recover the amount of the instalments which he had paid. The bill prayed a discovery in aid of that action.

The defendants put in general demurrers.

Mr. Sugden, Mr. Pepys, Mr. Simpkinson, Mr. Purvis, and Mr. Jacob, in support of the demurrers:—First, this state has never been acknowledged by Great Britain. There is an existing treaty which recognizes Guatemala as still belonging to Spain. In order to avoid a demurrer, an allegation has been introduced into the bill, that Guatemala is a sovereign and independent state, and has been recognized as such by his majesty; and the simple question is, whether that allegation can have the intended effect. Now the judge is bound to know that our government has never recognized this state: and, if an allegation, which \*is false on the face of it, is made [\*216] in a bill, it goes for nothing.

Second: The buying of these securities was an illegal act; and, therefore, the court will not aid the plaintiff to recover his money.

Third: The fraudulent conduct imputed to the defendants, amounts either to a conspiracy, or to obtaining money under false pretences, which are indictable offences; [1] the defendant cannot therefore be compelled to answer the bill. (b)

(b) The arguments upon this third objection are not reported at length, because the court decided the case upon the first.

[1] Vide *Fleming v. St. John*, ante, 181.

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Mr. Bickersteth, Mr. Pemberton, and Mr. Hill, in support of the bill :—It has been assumed that the court is bound to know that the allegation in question is not true : but it has not even been hinted what is meant by the recognition of a state. There might be such a recognition as a judge would not be held to have judicial knowledge of. A congress was held at Panama, and officers from our king met, there, functionaries from Guatemala. Is it unlawful to enter into contracts with a state, because it has not been formally recognized by treaty, or by the sending of an ambassador or other public functionary. If so, no contracts can be made with the governments of the South Sea Islands and of many other countries. Doctrines so subversive of fair dealing, were never before propounded. In October, 1823, two years before this transaction took place, Spanish America was recognized, by our government, as separate [\*217] rated from Spain ; \*for consuls were sent to those parts of that country where the protection of British commerce required them. The ground of Lord Eldon's doubt in *Jones v. Garcia del Rio*, (c) was not that the transaction was with an unrecognized state, but that this country was at peace with Spain. Will any one say that, after commerce between Great Britain and these provinces has been permitted from year to year, and after consuls have been sent to them, there is still the difficulty existing that struck the mind of Lord Eldon ? It is important to look at the mode in which the recognition took place. It was not a recognition of certain particular states ; but a distinct unqualified recognition of the independence of the whole of Spanish America ; and the only distinction that was made in the sending of ministers, arose from the greater importance of the places to which they were sent. Guatemala was part of Mexico ; and the independence of Mexico was recognized the first of all the provinces. In the king's speech delivered in 1824, we find a distinct recognition of the same independence. It is not necessary that there should be a treaty subsisting, and a resident minister, to give validity to contracts between two states. (d) Supposing that a contract between an unrecognized state and an individual of this country, would not be valid, does it necessarily follow that, if the goods, the subject of the contract, were actually purchased and brought into this country, they could not be made the subject of barter or contract here ?

It is clear that, if the facts stated in the bill are proved, an action for [\*218] money had and received might \*be maintained. If, therefore, there is a clear ground of action, why is it not a case for discovery ? Will it be said that there is no ground of action because the contract was illegal ? But money paid upon an illegal contract may be recovered, if the contract is not completed ; (e) and, therefore, it is not necessary to show that the contract between Barclay & Co. and the Guatemala government was legal. If, indeed,

(c) 1 Turn. & Russ. 297. (d) Vattel, Law of Nations, Book II. chaps. 3 and 4.

(e) *Aubert v. Walsh*, 3 Taunt. 277 ; *Tappenden v. Randall*, 2 Bos. & Pull. 467 ; *Cotton v. Thurland*, 5 T. R. 405 ; *Morris v. Robinson*, 3 Barn. & Cress. 196 ; *Bate v. Cartwright*, 7 Price, 540 ; *Thistlewood v. Cracroft*, 1 M. & S. 500.

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Barclay & Co. had received the whole of the instalments, and had delivered the obligations to the plaintiff, and those obligations could not be enforced because they were illegal, the plaintiff must have acquiesced in his loss.

If a partnership defraud a person, can it be said that, as the partners have conspired to commit a fraud, an indictment against them would lie, and therefore they cannot be compelled to give a discovery. If that be so, then, in all cases where two persons join in cheating a third, he can obtain no discovery from them, and the only case in which this court will give its assistance, is where the fraud has been committed by a single person. There is scarcely ever a bill filed to unravel a fraud, that does not state a case of conspiracy. But this bill does state a case which, if proved, would subject the defendants to a prosecution for a conspiracy. But if it did state such a case, the defendant is not, on that account, protected from answering. (f) If the bill had imputed a felony to the defendants, they could not have put in a demurrer \*for [\*219] want of equity, but could not have demurred to those questions only which tended to support the indictment. In *The Attorney General v. Brown*, the Lord Chancellor says: "The next question is," &c. (g) The first allegation in the bill is that, in August, 1825, Barclay & Co. and Powles & Co. respectively carried on business in partnership together: the next is that this state has been recognized. The defendants are, at all events, bound to answer these statements: and, if there are any passages in the bill that impute a crime to the defendant, they form a very small part of it.

Mr. Sugden in reply:—The sending of consuls has relation to commerce only. Up to this time three only of the provinces of Spanish America have recognized; and that has been done by solemn treaties, and the sending of ministers to reside in them; but Guatemala is not one of those states. Inquiry has been made, at the foreign office, and the answer returned is that Guatemala has not been recognized as an independent state. The case of *Yrissari v. Clement* (h) was decided two years after a consul had been appointed. With respect to the right to recover upon an illegal contract which is not completed, if a man agrees to lend 500*l.* at usurious interest, and pays 50*l.* of it, he cannot recover it, as the offence is complete. A party dealing with the government of Guatemala, deals with it as a sovereign state: therefore the court cannot entertain jurisdiction; as it cannot be put upon the record that there is such a government as Guatemala. The case put of a \*barbarous [\*220] state does not apply; for this is a revolted colony of Spain. Throughout the whole of the bill, it is stated that the contract was made with Barclay & Co. as the agents of the Guatemala government; and, when the money was received by the agents, it became the property of the employers. It is, then, money raised for Guatemala; and this court will give no relief, as the contract was illegal. The case stated at the bar for the plaintiff, is very

(f) *Green v. Weaver*, ante, 1st vol. 404.

(g) See 1 Swanst. 293.

(h) 2 Carr. & Payne, N. P. C. 223; and 3 Bink. 432.

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contradictory to that made by the bill. By the latter the contract is alleged to be legal; but the plaintiff's counsel assert that it is illegal. If it be legal, how can it be contended that the plaintiff is entitled to recover on the ground that it is illegal? *Green v. Weaver* was decided on the ground that the party had given a bond for the due performance of his duty as a broker, which he had violated. *Thorpe v. Macauley*,<sup>(t)</sup> decided that a discovery could not be compelled in aid of a criminal action.

The VICE-CHANCELLOR:—In consequence of the arguments in this case, I have had communication with the foreign office, and I am authorized to state that the Federal Republic of Central America has not been recognized, as an independent government, by the government of this country. It appears to me that, when it is stated, in the bill, that this republic was, and still is, a sovereign and independent state, recognized and treated as such by his majesty the king of these realms, it must have been meant that it must have been recognized, by the government of this country, as an independent state altogether; [\*221] and, inasmuch as I conceive it is the duty of the judge \*in every court to take notice of public matters which affect the government of the country, I conceive that, notwithstanding there is this averment in the bill, I am bound to take the fact as it really exists, and not as it is averred to be: and then it does not seem to me that there is any substantial distinction between the present case, and the case in which I formerly gave judgment, that is, the case of *Thompson v. Powles*.

I observe that, in this case, the bill is filed for discovery only; but it does not appear to me that the circumstance that, in one case, discovery alone is sought, at all tends to introduce a distinction in the judgment that has been given in a case where the bill was filed for discovery and relief. The judgment proceeded, not on the question whether the court should give relief or not, or give a discovery or not, or give discovery and withhold relief; but upon the question whether the king's courts should attend to the case of a party who founded his case on the representation that certain persons did form an independent government, recognized by this country, when the government of this country did not so recognize them. It appears to me that sound policy requires that the courts of the king should act in unison with the government of the king. Now I apprehend that what Lord Eldon proceeded upon, was a general doctrine of policy, that is, that he would not allow a person to sue, at least as a plaintiff, in the court of chancery, who founded his case upon the representation that there was that existing as an independent government, acknowledged by this country, which, in fact, was not so. It is impossible for me to [\*222] suppose that any other than some such general principle \*as that influenced him, when I observe what his lordship did in the case of *Bire v. Thompson*. The case was mentioned as an unreported case, but I have got the very brief, which I, as counsel, held on an application to Lord

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Eldon in that case. It was represented, by the plaintiffs, that, in August, 1823, the defendant entered into an agreement, with the government of the Republic of Colombia, to take a lease of certain salt mines; and then certain circumstances are stated regarding that lease. It is stated that the defendant had not himself funds sufficient to complete the contract; but, as the contract with these parties was a very advantageous contract, the defendant was desirous of completing the same; and that, about the month of April, the defendant came over to this country, to provide funds to enable him to complete the advances to the Republic of Colombia, and entered into a treaty, with certain persons, for the purpose of raising a portion of the money for completing this contract. It was then represented that there was an agreement signed, which had been prepared and approved of between the parties; and it was represented that the plaintiff was willing to perform the agreement; and it was asked, by the bill, that the defendant might be restrained, by the order and injunction of the court, from transferring or assigning, or agreeing to transfer or assign, the part of the contract so entered into between him and the Republic of Colombia for that purpose; and this statement of the case was verified by affidavits. And, on this case, as it appears to me, as a matter of course, the court would have granted the injunction, unless there had been this objection, founded upon the representation that the original contract was made with the government of the Republic of Colombia, \*Lord Eldon thought it right to refuse the [\*223] application; and the note I have, is that the Lord Chancellor refused the application because he could not take notice of the Republic of Colombia.

Now, in this case I am asked to compel the defendant to make a discovery, to the plaintiff, of certain proceedings, all of which are bottomed on the original representation that certain persons were the agents of the government of the Federal Republic of Central America, which then was and is an independent state, the fact being that it was not then, has not been, nor is now, an independent state, acknowledged by the government of this country. It appears to me that, without saying how far the plaintiff might have had the discovery which he asks, provided he had represented his case otherwise, yet, if he makes this fact the foundation of his case, that this is an independent government, recognized by the government of this country, when it is not so, I must judicially take notice of what is the truth of the fact, notwithstanding the averment on the record, because nothing is taken to be true except that which is properly pleaded: and I am of opinion that, when you plead that which is historically false, and which the judges are bound to take notice of as being false, it cannot be said you have properly pleaded, merely because it is averred, in plain terms: and that I must take it just as if there was no such averment on the record. My opinion is, without making any new law, which I entirely disclaim, but merely meaning to follow the precedents which Lord Eldon laid down as bottomed on sound policy, that I must allow the demurrer.[1]

[1] Vide *Gelston v. Hoyt*, 3 Wheat. 324. *Glyn v. Soare*, 3 Myl. & K. 450.



1828.—*Beddall v. Page.*

[\*224]

\*BEDDALL V. PAGE.(a)

1828; 24th January.—*Practice.—Injunction.*

If a defendant, who has been taken on an attachment still refuses to answer, the plaintiff may, at the same time, proceed to enforce an answer by the process of this court, and bring an action against him and his sureties on the bond given to the sheriff under the attachment.

THE defendant having been taken on an attachment for want of answer, gave the usual bond to the sheriff. The answer not being put in according to the condition of the bond, the plaintiff obtained an order for a messenger to go against the defendant, and also took an assignment of the bail bond, and brought actions, against the defendant and his sureties, thereon.

Mr. *Barber*, for the sureties, now moved for an injunction to restrain the actions, and contended that the plaintiff had no right to pursue a double remedy against the defendant, by suing on the bail bond, and at the same time going on with the process of this court; and that, by having obtained the order for the messenger, he must be considered to have made his election to proceed in equity, and ought therefore to be restrained from proceeding at law.

He cited *Anon.*, (b) and a MS. case of *Hill v. Hill*, 1821, before Sir J. Leach, V. C. where, after attachment and bail bond given, the answer was filed, which was afterwards excepted to, and reported insufficient; and then a further answer was put in, upon which, actions previously brought on the bail bond, were stopped.

Mr. *Sugden* and Mr. *Pattison*, for the plaintiff, contended, 1st, that [\*225] the present motion could not be \*entertained at all, since the sureties had no right to appear, except through their principal. the defendant, who, being in contempt, could not himself have appeared; 2dly, that the MS. case cited by Mr. Barber, did not touch the present case; for there it was *after* answer put in that the action had been stopped; here no answer had ever been put in; 3dly, that, unless the plaintiff might, in such a case, bring actions on the bail bond, the taking it was an useless expense; and, lastly, that the plaintiff ought to be allowed to compel an answer in every way he could.

The Vice-Chancellor said that the giving of a bail bond would be quite useless if no proceedings could be taken on it, and refused the motion, with costs.[1]

(a) *Ex relations.*

(b) 2 Atk. 507.

[1] If the complainant has received notice of the defendant's appearance, he may have an order of course that he put in his answer in forty days after service of a copy of the bill, and notice of the order, or that the bill be taken as confessed. Where a discovery is necessary, on filing an affidavit thereof, the order may be varied so as to require the defendant to answer in like manner, or that an attachment issue." Rule 24, Ch. N. Y. And see further as to attachment for not answering, 1 Hoff. Ch. Pr. 178, 182.

1828.—Girdlestone v. Doe.

## GIRDLESTONE v. DOE.

1828; 7th February.—*Will.—Construction.*

Bequest of 40*l.* per ann. to A. for life, and after her decease, to B. or his heirs; held, that “or” must be construed disjunctively; and that therefore B. did not take an absolute interest in the annuity.

THOMAS DOE bequeathed, to Mary Tattershall, the yearly sum of 40*l.*, to be paid out of the interest and dividends arising from his stock in the long annuities, to be enjoyed by her during the term of her natural life; and, immediately after her decease, he gave and bequeathed the same unto his nephew James Holman, or his heirs. Holman, after the testator’s decease, and in the life-time of Mary Tattershall, sold and assigned, his annuity of 40*l.*, to the plaintiff. Holman died in the life-time of Mary Tattershall; and, upon her decease, the bill was filed against the defendant, the surviving executrix of the testator, praying that she might be decreed to transfer to the plaintiff the sum of 40*l.* per ann. long annuities, part of the \*long annuities [\*226] belonging to the testator’s estate or that a competent part of those annuities might be appropriated for payment of the yearly sum of 40*l.* assigned to the plaintiff as before mentioned.

Mr. Lovat, in support of the demurrer.

Mr. Bellamy, in support of the bill, contended that the word “or” in the bequest to the testator’s nephew, must be construed “and,” and that the nephew took an absolute interest under that bequest. He cited *Richardson v. Spraag*(a) and *Read v. Snell*.(b)

THE VICE-CHANCELLOR:—It appears to me that “or” must be construed disjunctively here, as the context requires it; and that the testator contemplated that his nephew might not be alive at the death of Mary Tattershall; and therefore I think that the nephew did not take an absolute interest in the annuity.[1]

## \*MAVOR v. DAVENPORT.

[\*227]

1828; 11th February.—*Specialty debt.*

By deed between A. and B. it was agreed that a sum in the hands of A., but belonging to B., should be laid out in the funds, in A.’s name, in trust for B.; A. died, never having invested the money; held, that B. was a specialty creditor of A. for the amount.

THE bill stated, and it was admitted by the answer, that, at the time of the execution of the indenture after mentioned, the plaintiff was possessed of 1200*l.* her own absolute property, and was desirous that the same should be paid to and vested in her father, John Mavor, and the defendant Davenport, and be

(a) 1 P. W. 434.

(b) 2 Atk. 543.

[1] Vide *Bengough v. Edridge*, 1 Sim. 271, note.

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 1828.—*Greenwood v. Parsons.*


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settled upon the trusts of the indenture ; that, accordingly, an indenture, dated the 25th of July, 1826, was made between John Mavor and the defendant Davenport of the one part, and the plaintiff of the other part, whereby, after reciting to the effect before stated, and that the 1200*l.* had been paid unto, and was then in the hands of John Mavor and Davenport, it was agreed and declared by and between the parties, that John Mavor and Davenport should stand possessed of the 1200*l.* in trust forthwith to invest the same, in their names, in the public funds, or upon government or real securities ; and that they should stand possessed of such funds and securities, upon certain trusts for the benefit of the plaintiff and the children she might thereafter have : that the 1200*l.* were, previously to the execution of the indenture, paid, by the plaintiff, into the hands of John Mavor, on the joint account of himself and Davenport, upon the trusts of the indenture : that John Mavor died on the 26th of August, 1826, having appointed Davenport his executor : that the 1200*l.* remained in the hands of the testator up to the time of his death, wholly unapplied [\*228] to the trusts \*of the indenture, and that the same still remained due from his estate.

The bill prayed that the 1200*l.* owing, from John Mavor, by virtue of the indenture, might be declared to be a specialty debt of the testator, and be retained, by Davenport, out of the assets of the testator, in his hands.

Mr. Rogers, for the plaintiff, cited *Gifford v. Manley*, (a) *Primrose v. Bromley*, (b) *Benson v. Benson*, (c) *Maltby v. Russell*, (d) and *Saltoun v. Houstoun*. (e)

Mr. Daniell for the defendant.

The Vice-Chancellor said that the 1200*l.* was a specialty debt of the testator, and that the defendant was entitled to retain it out of the assets of the testator. [1]

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 [\*229]

\*GREENWOOD v. PARSONS.

1828 ; 3d March.—*Practice.—Examination of witnesses.*

In support of a charge brought in under the decree, two witnesses, examined, by the plaintiff, to prove the defendant's hand-writing, said that they did not believe it to be his hand-writing ; leave was given to the plaintiff to examine fresh witnesses to the same point.

By the decree in this cause it was referred to the master to take an account of all the dealings and transactions in partnership between the plaintiff and the defendant.

In order to prove that 2500*l.* consols, which the defendant had purchased in his own name, and which was one of the items of the charge brought in by the plaintiff under the decree, had been bought with the partnership moneys, it was necessary to prove that an endorsement, to that effect, on the stock receipt, and the signature thereto, were in the hand-writing of the defendant. For this

(a) For. 109. (b) 1 Atk. 89. (c) 1 P. W. 130. (d) 2 Sim. & Stu. 227. (e) 1 Bing. 433.

[1] Vide *Walker v. Bynum*, 4 Desau. 555. *McDowell v. Caldwell*, 2 McCord, (So. Car.) 56.

1828.—Greenwood v. Parsons.

purpose the plaintiff examined two witnesses, upon interrogatories, both of whom deposed that they did not believe that either the endorsement or the signature thereto was the defendant's hand-writing. Upon the depositions being published, the plaintiff applied to the master for leave to examine other witnesses to prove the fact in question. In support of this application an affidavit was made, by the plaintiff, and one Parry, an accountant, in which the former swore that the defendant, on some occasions, wrote in a different character or style from what he did on others, and had boasted that he could do so : that the endorsement and signature were in a different hand from that generally used by the defendant : that they were written, by the defendant, in the plaintiff's presence, and that the stock receipt, with the endorsement on it, was delivered, by him, to the plaintiff, on the day on which it was dated, to be kept, by the plaintiff, as \*evidence of the transaction. Parry deposed that [\*230] the endorsement and signature were in the hand-writing of the defendant ; and two other persons made affidavits to the same effect. The master, however, was of opinion that he could not comply with the application without an order of the court. The plaintiff now moved the court for that order, having given notice of his intention to read, upon the motion, the affidavits before mentioned. No affidavit was filed in opposition to the motion.

Mr. *Pepys* and Mr. *Cooper*, for the plaintiff, read the affidavits, and said that, generally speaking, the court would not allow a witness to be examined after publication past ; but that there were exceptions to the rule, as in the case of surprise, where the facts could have authorized the granting of a new trial at law : *Gage v. Hunter* : (a) that, in the present case, it was not a fact, but a document that was sought to be established, *Clark v. Jennings*. (b) In *Willan v. Willan*, (c) Lord Eldon, C. says : "It is perfectly established that after publication previous to a decree, and the depositions have been seen, you cannot examine witnesses further, without leave of the court, which is not obtained without great difficulty ; and the examination is generally confined to some particular facts." Lord Eldon, therefore, admits that, under particular circumstances, a new witness may be examined after publication ; and the case of *Shepherd v. Collyer*, cited in the judgment, is a direct authority to that effect. At law, when the witnesses fail to make out the case, the court will, on the ground of surprise upon the plaintiff, grant a \*new trial : or, if the [\*231] plaintiff is nonsuited, he may bring a fresh action the next day. It must be borne in mind that the danger of allowing a witness to be examined, after publication, to prove a document, is not so great as it is where a particular fact is to be proved ; and that the defendant, here, does not come forward and say that this document is not in his hand-writing.

Mr. *Horne*, and Mr. *Wilbraham*, for the defendant :—The plaintiff in this case chose his own witnesses, and they denied that the indorsement and signature were in his hand-writing ; and he now seeks to contradict their testi-

(a) 1 Dick. 49.

(b) 1 Anst. 173.

(c) 19 Ves. 590, 592.

1828—Greenwood v. Parsons.

mony. In the case cited, the facts to be proved had not been examined to before. The doubt here has not been created by the contradictory testimony of the defendant's witnesses, for they were not examined upon the subject. The witnesses must have considerable intercourse with the defendant. One of them was a member of a tontine society, of which the defendant was secretary; and the other was a member of the committee of the same society. The plaintiff, in his affidavit, says that the defendant, on some occasions, wrote in a different style from what he usually did. The other persons who have made affidavits say that the indorsement and signature are in his hand-writing, but they do not agree with the plaintiff in saying that it is different from his usual style.

Mr. *Pepys* in reply :—The transfer receipt for the stock in question, is in the possession of the plaintiff. This puts the matter beyond all doubt; for why was it put into his possession except to enable him to have the [\*232] \*benefit of the indorsement upon it? The plaintiff and three other persons swear that it is in the hand-writing of the defendant, and he does not deny it. Neither of the witnesses negatives that it is his hand-writing: so that the plaintiff does not ask to contradict his own witnesses, but only to supply a defect in their testimony.

The VICE-CHANCELLOR :—The plaintiff has examined two witnesses to prove the hand-writing of the defendant. The witnesses say that they do not believe it to be his hand-writing. This is rather a testification of ignorance than a denial of the fact.

On looking at what Lord Eldon lays down, in *William v. William*, it is quite clear that, if the point had not been examined to before, the subsequent examination might have been allowed.[1] But the question is, whether the plaintiff ought in this case, to be permitted to examine fresh witnesses to a point that has been examined to before? Now it appears to me, that, as the previous examination did not furnish any reason why there should not be a further examination, an order ought to be made according to the prayer of the motion.

Motion granted, on payment of costs.[2]

[1] Vide *Hammersley v. Lambert*, 2 Johns. Ch. Rep. 432. *Boyd v. Dunlap*, 1 Johns. Ch. Rep. 483.

[2] So where a witness was produced at the hearing to prove a deed, and failed in making out the proof, the plaintiff had leave to exhibit interrogatories to prove the deed before a master. *Lawrence v. Sharpe*, 1 Moll. 252. Where an instrument has been omitted to be proved through mistake or inadvertence, the party has been allowed to supply the omission. *Desplaces v. Goris*, 5 Paige, 252. *Hood v. Pimm*, 4 Sim. 101. So, to prove the loss of a deed, *Cox v. Allingham*, Jac. 337. Re-examination allowed, where the examiner had omitted to take down part of the witness' examination. *Bridge v. Bridge*, 6 Sim. 352. Where the examiner had made a mistake in taking down the testimony of a witness who was very aged and deaf, the witness was examined *ore tenus* in court. *Denton v. Jackson*, 1 Johns. Ch. Rep. 526. Where an interested witness has been examined, he has been allowed to be re-examined after his interest has been removed by release. *Milward v. Atkins*, Jac. 339. n. *Gleeson v. Sandwich*, 1 Flan. & Kel. 240. See further, *Williams v. Goodchild*, 2 Russ. 91. *Moons v. De Bernales*, 1 Russ. 307. *Abrams v. Winship*, id. 526. *Martens v. Whickelo*, 1 Cr. & Ph. 257. *Smith v. Harding*, 1 Flan. & Kel. 184. *Healey v. Jagger*, 3 Sim. 494.

1828.—*Reece v. Steel.*

\*REECE V. STEEL.

[\*233]

1828; 17th March.—*Will.—Construction.*

Devise to A. for life, and to her heirs, the issue of her body for ever, for their lives: and in case A. has no son, then to her eldest daughter; followed by a proviso, containing a devise over if A. left no issue, or they should become extinct, creates an estate tail in A.

THE Reverend Henry Williams devised as follows: "First, I give, devise, and bequeath, unto my niece Charlotte Higgon, all my real estate in the parish of Lanishen, during the term of her natural life, and to her heirs, the issue of her body, for ever, during the term of their natural lives. If my niece has no son, then to her eldest daughter. There shall be no co-heiresses to any part of my real estate, each succeeding by priority of birth, in case the elder leaves no issue; and, to all my real estate wheresoever situate, each heir shall only be tenants for their respective natural lives, during the term of ninety-nine years from the date of my decease; divesting all from power to sell. If my niece marries without a settlement of 200*l.* a year in landed property, exclusive of what property I leave her, or 2000*l.* in money vested, in the hands of trustees, for the benefit of herself and children, her own issue, in neglect hereof her eldest son or daughter shall take possession, and inherit my real estate in the parish of Lanishen, as soon as the son or daughter shall attain the age of twenty-one years. If my said niece shall leave issue and die, her husband, if he marries again, shall forfeit all my real estate to her son or daughter as soon as either is of the age of twenty-one years. My niece's husband must take the surname of Williams. But, if my niece Charlotte Higgon shall leave no issue, then her husband shall enjoy and possess whatever property I shall leave her, during the term of his natural life. Until my \*said niece [\*234] marries, my executors hereafter named I nominate and appoint to be her trustees or guardians; and they are to allow her 80*l.* a year, to be paid half-yearly; and the remainder of rents, issues and profits they are to lay out in necessary improvements of my house and farm, under proper securities, for her benefit. They have power to remove tenants, and place others, but not to lease any part of the estate. Her eldest son on coming of age, is to be allowed, out of the real estate, 50*l.* a year, and to be brought up a scholar. No timber to be cut down, unless for necessary repairs, or what is spoiling by decay. Provided my niece leaves no issue, or should they become extinct, in this case, all my real estate, whatsoever, I give, devise and bequeath unto the elder son of John Wood, my second cousin, and to his male heirs, for ninety-nine years. No female shall inherit for that period; and they are to take the surname of Williams, and only to be tenants for their natural lives for the last mentioned term of years."

The suit was instituted to compel a specific performance of an agreement for the sale of the testator's property in the parish of Lanishen. Upon the argument of a demurrer filed by the defendant, the purchaser, the question was, what estate the testator's niece took under the will in this property?

1928.—Reece v. Steel.

Mr. *Bickersteth* and Mr. *Keene*, for the defendant :—It is admitted that, unless Charlotte Higgon took an estate tail in this property, a good title cannot be made to it. The testator intended to give her a life estate only in it, with remainders to her first and other sons in tail. There is, first, an express [\*235] devise to \*her for life, and the word “heirs” that follows, is descriptive of the persons who are afterwards to take, namely, her issue, who, in the next sentence, are mentioned to be her sons and daughters. *Goodtitle v. Herring*.(a) The direction that no timber shall be cut upon the estate, and the clauses which relate to the events of the niece marrying without an adequate settlement, and dying without leaving issue, are consistent with the life estate expressly given to her, and show that the testator intended her not to have any power of disposition over the estate, but to take it for her life only.

Mr. *Sugden*, and Mr. *Knight*, for the plaintiffs :—It is not disputed that the words : “heirs of the body,” may sometimes be construed to mean : “first and other sons ;” but, under this will, the second takers cannot be held to have estates tail given to them, unless the first taker is held to be tenant in tail. The testator had two intentions in this case ; one was, that all the heirs of his niece, being her issue, should take ; the other, that they should take in a particular way. It comes within the rule that is adopted, where there is a particular and a general intention, both of which cannot be effected. The general intention, here, was that every branch of the niece’s issue should take. How can effect be given to that intention, without giving, to the first taker, an estate tail ? It is most important to observe that, in this case, there is a gift over on failure of issue. *Jesson v. Wright*.(b)

The Vice-Chancellor, at first, proposed that a case should be stated, [\*236] for the opinion of a court of law, \*upon the devise in question : but the counsel having intimated to his Honor that the parties were willing to be bound by his decision, he delivered judgment as follows :—

The testator, in this case, has devised all his real estate in the parish of Lanishen, to his niece, during her life, and to her heirs, the issue of her body, for ever. These words would give the niece an estate tail.[1] But he then proceeds to explain these previous words ; and thereby creates the difficulty that exists in construing this will. Now it is quite clear that the gift cannot take effect in the mode intended ; for heirs for ever, never could take for their lives. But what I rely on, is, that there is here, first, a gift which would create an estate tail ; and then the proviso in case the niece leaves no issue, contains a limitation over, which, according to *Jesson v. Wright*, would clearly give an estate tail.

Demurrer overruled.

(a) 1 East, 264.

(b) 2 Bligh, 1.

[1] Vide *Roosevelt v. Thurman*, 1 Johns. Ch. Rep. 220. *Burnet v. Denniston*, 5 Johns. Ch. Rep. 35.

1828.—*Delondre v. Shaw.*

\*AUGUSTE DELONDRE and JOSEPH PELLETIER v. JOHN SHAW, [\*237]  
HENRY SHAW, JOHN SHAW, the Younger, and RICHARD SHAW.

1828; 16th April.—*Equity—Injunction—Copyright.*

A., the inventor of a medicine, employed B., a foreigner residing abroad, to manufacture it for him there, and sold it in England for his own sole profit. A label and seal denoting that the medicine was manufactured by B. and sold by A., were affixed to each of the bottles in which it was sold. The defendants imitated the labels and seals. Demurrer allowed to a bill to restrain the imitation, and for an account of the sales of the spurious labels and seals, A. having no interest

The court will not protect a foreigner's copyright.

THE bill stated that the plaintiff, Delondre, had invented a very valuable and celebrated chemical preparation of Peruvian bark, called sulphate of quinine: that he employed agents in this country to assist him in selling it here: that he agreed with the plaintiff, Pelletier, a chemist, and native of France, to prepare the medicine, which he, Delondre, was to vend in England, for his sole benefit: that, for ensuring the genuineness of the medicine, the plaintiff caused a seal to be engraved, after a device invented by Pelletier, containing the following words: "Produits Chimiques de J. Pelletier, J. P." and also a serpent, and a cross of the legion of honor of the kingdom of France: that Delondre sold the medicine in bottles; and, for the purpose of preventing fraud being committed on the plaintiffs by spurious imitations, he caused a plate to be engraved containing the following words: "Sulphate de quinine. Auguste Delondre neg't. a Paris:" that, on all bottles containing the medicine, there was pasted a label, containing an impression from the plate, and that the corks were sealed with the seal, for the purpose of preventing spurious preparations being sold for the preparation aforesaid, and to prevent the plaintiffs from being defrauded thereby: that \*the defendants [\*238] were engravers and printers, and had lately, engraved and printed labels and seals which were exact imitations of the plaintiff's label and seal, for the purpose of selling the same to the public, with a view to their being affixed to bottles containing sulphate of quinine, to the intent that the purchasers thereof might be induced to believe that such sulphate of quinine was the sulphate of quinine sold by Delondre.

The bill prayed for an injunction to restrain the defendants from copying, imitating, or selling, or exposing to sale, or parting with, the labels and seals, printed and engraved by them, or labels or seals, or impressions thereof, being colorable imitations(a) of the labels or seals, or impressions thereof, used by the plaintiffs; and that they might account for, and pay to the plaintiffs the moneys they had received from the sales of such spurious labels and seals, and impressions thereof.

The defendants demurred, to the bill, for want of equity.

Mr. Sugden, and Mr. Loftus Lowndes, for the defendants, in support of

(a) Qu. variations.



1828.— *Delondre v. Shaw.*

the demurrer :—The bill does not allege that the defendants are assisting in selling a spurious article. These plaintiffs have no right to sue jointly. Delondre is the inventor of this preparation ; and Pelletier is merely his agent.

The whole interest is in Delondre. It is now settled to be a good [\*239] ground of demurrer that there is a plaintiff \*on the record who has no interest in the subject matter of the suit. *King of Spain v. Hullett.*(b)

How can the defendants be prevented from imitating what was invented in France ? What fraud is there in the defendants printing these labels to be put on Delondre's bottles. The plaintiffs cannot say that a single label has been put on sulphate of quinine which they have not sold. The prayer is for an injunction and an account of what the defendants have made by the sale of their labels. This court grants an injunction as ancillary only to the relief. The plaintiffs are not dealers in labels.

Mr. *Bickersteth* and Mr. *Pole*, for the plaintiffs, in support of the bill :—The defendants are doing what facilitates the commission of fraud by other persons. Pelletier, who is a chemist of great celebrity, is made a co-plaintiff, not as having any interest in the medicine, but as being entitled to prevent his name being used. When a man has affixed a mark to distinguish his own property, can any person make and vend the same articles for the purpose of deceiving the world ?[1] Then, as to the account ; the defendants have sold what the plaintiffs have appropriated to their own use, and they have therefore sold them for the use of the plaintiffs. In order to induce the court to grant an injunction, it is not necessary that there should be any act of fraud committed ; but only that there should be an act of fraud threatened. *Knye v. Moore.*(c)

[\*240] \*The VICE-CHANCELLOR :—The plaintiffs do not show that they are entitled to an account from the defendants ; for I cannot understand, from this bill, that Pelletier has any interest in these labels and seals.[2] The circumstance that he was the inventor of the seals, will not justify the court in interposing in his behalf ; for he was a foreigner, and the court does not protect the copyright of a foreigner. It appears, therefore, that Pelletier is not entitled to the account ; and the injunction is ancillary to the account.

It is not alleged that there is any sulphate of quinine sold, except that which is manufactured by Pelletier according to Delondre's receipt. The bill does

(b) Not yet reported.

(c) 1 Sim. & Stu. 61. See the concluding passage of the judgment, page 65.

[1] Vide *Bell v. Locke*, 8 Paige, 75. *Snowden v. Noah*, Hopk. 347. Injunction granted to restrain the defendant from running an omnibus having upon it such names, words and devices as to form a colorable imitation of the words, names and devices on the omnibuses of the plaintiff. 2 Keen, 212.

[2] It is a good ground of demurrer that a joint plaintiff has no interest in the subject of the suit. *Marquis of Cholmondely v. Lord Clinton*, Turn. & Russ. 107. *King of Spain v. Mechado*, 4 Russ. 225. *Makepeace v. Haythorne*, id. 244. *Cuff v. Platell*, id. 242. *Clarkson v. De Peyster*, 3 Paige, 336. *Rhodes v. Warburton*, 6 Sim. 617. *Wake v. Parker*, 2 Keen. 59. *Egan v. Heenan*, 1 Flaß. & Kel. 39. *Page v. Townsend*, 5 Sim. 395. *King of Spain v. Hullett*, post, 296, note. *Glasco v. Lawrence*, 3 Edw. 53.

1828.—*Simons v. Milman*.

not ask an injunction to restrain a sale of spurious sulphate of quinine ; and I cannot intend a fraud where none is alleged.

The parties who ask joint relief are not entitled to joint relief ; and, on this ground, the demurrer must be allowed.

\**SIMONS v. MILMAN.*

[\*241]

1828 ; 16th and 21st April.—*Pleading*.—*Executor*.

An executor filed a bill before probate : plea that he had not proved the will, allowed.

IN this case, letters of administration of the effects of a person deceased, had been granted, to the defendant, under the impression that the deceased had died intestate ; whereas, in fact, he had died testate, and had appointed the plaintiff his executor. The object of the bill was to recover part of the assets of the testator, which was in the possession of the defendant, the administrator ; and the bill alleged that probate of the will had been granted to the plaintiff, which was not the case.

The defendant put in a plea, stating that probate had not been granted to the plaintiff.

Mr. *Spence*, in support of the plea, cited the following passage from 1 Com. Dig. Administrator, B. 1 : “ But if a man make a will, and an executor, administration granted before probate or refusal is void, if the will be afterwards proved ; though it was concealed, and not known at the time of administration granted ;” and said that, as the will had not been proved, the plea must be allowed.

Mr. *Koe*, in support of the bill, said that an executor might file a bill before he had proved the will ; and that all that was required was that he should prove the will before the hearing of the cause, *Humphreys v. Humphreys*.(a)

\*The VICE-CHANCELLOR :—When a cause comes on to be heard, [\*242] it must appear that the incipient character of executor, which the plaintiff has under the will, has been perfected by proving the will. Here an executor files a bill alleging himself to have obtained probate ; but it appears that he has not obtained probate at the time when the cause comes on to be heard ; for, for the purpose of the plea, I consider it to be the same thing as if the cause was now being heard upon bill and answer. The case rests upon the fact that the plaintiff has obtained probate in opposition to the administration previously granted. The case cited by the plaintiff’s counsel, is one in which the party had not obtained probate originally ; but, before the cause was argued, he had obtained it. The fact alleged and admitted in this case, is

(a) 3 P. W. 349. See *Humphreys v. Ingleden*, 1 P. W. 752.

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 1828.—Causton v. Macklew.
 

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that probate has not been obtained ; it therefore appears to me that I must allow this plea.[1]

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### CAUSTON V. MACKLEW.

1828 ; 17th April.—*Vendor and Purchaser*.—*Title*.—*Judgments*.

Old judgments existing against a former owner of leaseholds, who parted with the property in 1770, and to enforce which no steps appeared to have been taken, are no objection to the title.

On the 27th of September, 1769, William Green purchased, and took an assignment of, a house in Berners street, in the parish of Mary-le-bone, for the remainder of a term of ninety-nine years, and, on the 23d of May, 1770, he made a mortgage of it, which afterwards became vested in Anne Hume, one of the plaintiffs. Green, being embarrassed in his circumstances, went, some years before his death, to reside in France ; and, in May, 1804, he died there, having appointed his wife his executrix. Mrs. Green died in her husband's life-time ; \*and, on the 1st of June, 1824, John Whitmore, another of the plaintiffs, who was the surviving executor of a bond and judgment creditor of Green, took out letters of administration to him, with his will annexed. In May, 1825, the plaintiffs sold the house to the defendant. The object of the bill was to compel a specific performance of the contract. The master, upon the usual reference being made to him, reported against the title. One of the objections to the title was, the want of evidence that various judgments, found to have been entered up against Green in the years 1768, 1769, 1770, had been satisfied.

The exceptions to the report now came on to be argued.(a.)

Mr. *Sugden*, Mr. *Bickersteth*, and Mr. *Sharpe*, for the defendant, in support of the exceptions :—There is a long list of judgments found against Green, who was forced to reside abroad on account of his debts. The court can-

(a) " Judgments do not, it seems, bind leasehold estates till writs of execution are taken out upon them, and delivered to the sheriff ; and yet, upon the purchase of a leasehold estate, judgments must be searched for ; because the sheriff will not permit his office to be searched for any writ of execution which may have been delivered there, lest the purposes of the writ should be defeated, by the party against whom it is issued absconding, or removing his goods : therefore, although the judgment will not, of itself, bind the leasehold estate, yet the purchaser cannot safely complete his contract where he discovers a judgment ; because he cannot be satisfied that an execution issued upon it has not been lodged with the sheriff."—*Sugd. Vend. and Purch.* 5th ed. 404.

[1] That the plaintiff, who sues as administrator, has not actually taken out letters of administration, or that the letters of administration are not granted by an officer having competent authority to grant them, in the particular case, may be objected to by plea, or in the answer, or by demurrer ; but if letters of administration are duly taken out, at any time before the hearing, it will be sufficient, and may be charged by way of supplement or amendment. *Goodrich v. Pendleton*, 4 Johns. Ch. Rep. 549. A plea denying the character in which the plaintiff sues, is evidently a plea in abatement. *Story's Eq. Plead.* 549, 564. *Lube's Eq. Pl.* 160. As to negative pleas, see *Denny v. Loeck*, 3 Myl. & Cr. 205, where *Thring v. Edgar*, 2 Sim. & Stu. 274, is questioned.

1828.—Causton v Macklew.

not know but that there may be writs in the hands of the sheriff. The [\*244] plaintiffs are bound to show, either that the person against whom the judgments are entered, is not the William Green under whom they claim, or that no execution has been taken out on these judgments. By the practice of the court of king's bench, if a *feri facias* has been taken out within a year and a day after the judgment has been entered, no *scire facias* is necessary to revive the judgment, but it may be put in force by entering continuances. It is, therefore, incumbent on the vendors to prove that no execution has been taken out; and, if they cannot do so, the defendant is not bound to take the title.

Mr. *Pepys* and Mr. *Knight*, for the plaintiffs, in support of the report:—No judgment entered up subsequently to the 23d of May, 1770, the date of the mortgage deed, can affect the title of the plaintiffs. The writ, (if any,) must have been lodged with the sheriff between that time and the 29th of September preceding.(b) No continuances have been entered, nor has any *scire facias* been taken out. No creditor has acted upon the judgments from the time when they were entered, down to the present day, a period of nearly sixty years. If this objection is to prevail, no executor can make a title to a leasehold estate.

The VICE-CHANCELLOR:—The question in this case is, whether [\*245] this title is bad because it is possible that, between the 27th of September, 1769, and the 23d of May, 1770, execution may have been taken out under these judgments, and lodged in the hands of the sheriff. If execution was not taken out before the latter day, the house which the defendant has agreed to purchase, could not be affected; as, on that day, Green parted with the legal estate. For, by the 16th sect. of the statute of frauds, it is enacted that no writ of execution shall bind the property of the goods against whom such writ of execution is sued forth, but from the time that such writ shall be delivered to the sheriff, under-sheriff, or coroner, to be executed. Now no evidence is produced to show that any execution was taken out on any of the judgments; and therefore it would be strong to presume the contrary, when nothing has been done that could be referred to execution taken out.

Exceptions overruled.[1]

(b) "It is usual to search for judgments against a vendor, only from the time he purchased the estate: but this practice is not correct; because judgments bind after-purchased lands, and will consequently affect such lands even in the hands of a purchaser."—*Sugd. Vend. and Purch* 404.

[1] In *Williams v. Craddock*, 4 Sim. 318, the V. C. adheres to his decision, and says: "I take the decision in *Causton v. Macklew* to be right, not because I decided it, but because it has not been appealed from." By the revised statutes of N. Y., vol. 2, p. 282, § 3, 4, (2d ed.) all judgments "shall bind, and be a charge upon the lands, tenements, real estate and chattels real of every person against whom any such judgment shall be rendered which such person may have at the time of docketing such judgment, or which such person shall acquire at any time thereafter." "From and after ten years from the time of docketing every such judgment, it shall cease to bind, or be a charge upon any such property, as against purchasers in good faith, and as against incumbrances subsequent to such judgment, by mortgage, judgment, decree or otherwise." The provision

1828.—*Prebble v. Boghurst.*

[\*246]

\*PREBBLE v. BOGHURST.

1828; 21st April.—*Costs.*

The master was ordered to tax the costs of all parties, and the amount was directed to be paid, out of the assets of the testator in the cause, by his executors, who were to be at liberty to pay the costs of certain parties to A. B., their solicitor. A. B. was an attorney of K. B. and C. P., but had never been admitted as a solicitor in the court of chancery; and the master, for that reason, disallowed the whole of his charges, except what he had paid to his clerk in court. He had, however, previously received from his clients, the full amount of his bills. The clients then petitioned for an order on the master to review his certificate, and tax A. B.'s bills; but their petition was dismissed.

SOME of the parties to this suit had employed W. L. T. Robins to act as their solicitor, although he had never been admitted a solicitor of the court. Robins employed Mr. Smith, as clerk in court for his clients, and was, during the whole progress of the cause, an admitted attorney in the courts of king's bench and common pleas. In the course of the suit a case was sent for the opinion of the judges of the court of common pleas.

One of the masters having certified, in pursuance of a reference made to him by the decree, that it would be for the benefit of the infant parties that the matters in difference should be referred to arbitration, the arbitrator awarded that the costs of all the parties should be paid, out of the assets of the testator in the cause, by his executors; and the award was afterwards made a rule of the court of chancery. The executors then presented a petition, praying that the costs of all parties might be taxed, and that they might be at liberty to pay, to Mr. Robins, what the master should tax for the costs of the parties for whom he was acting; and an order was afterwards made upon this petition accordingly. Under this order, Robins carried in bills of costs, headed with the name of the cause, and intitled as the bill of costs of his clients.

[\*247] The master \*disallowed the whole of these bills, except so far as they related to Mr. Smith, on the ground that Robins had never been admitted as a solicitor of the court. His clients thereupon presented a petition stating these facts, and that, at a certain time, which was before the award was made a rule of court, they had paid Robins the full amount at which their costs had been taxed, and thereby became entitled, themselves, to receive to that amount, although the same had been directed, by mistake, to be paid to Robins. And they prayed that it might be referred back to the master to review his certificate, and to tax all the said bills of costs pursuant to the award and orders made thereon, and that they might be at liberty to except to the certificate.

Mr. *Horne*, and Mr. *Wakefield*, in support of the petition:—Where costs are directed to be paid to a party in a cause, they are the costs of the party,

limiting the duration of the lien of a judgment is, however, of an earlier date, the first statute on the subject being in 1811. A revival of a judgment by *scire facias*, does not save it from the operation of the judgment, or create a new lien. *Mower v. Kip*, 2 Edw. 165. S. C. 6 Paige, 88. *Mohawk Bank v. Atwater*, 2 Paige, 54.

1828.—*Prebble v. Boghurst.*

and not of the solicitor. Where the bill of costs of a solicitor is ordered to be taxed, it is done on the application of his client. In cases where acts of parliament award double or treble costs, the party's costs exceed those of his attorney, and the latter gives him credit for the surplus. In a cause and cross-cause, the lien of the solicitor is only on the balance of the costs, as they are set off against each other; which would not be done if they were the costs of the solicitor. A solicitor, if he is not paid his costs by his own client, cannot recover them from the party who is ordered to pay them. The provisions of the statutes relating to attorneys and solicitors, apply only as between them and their clients; here there is no question between the solicitor \*and his client. Although the subpoena for costs directs them to be [\*248] paid to the party or bearer, the bearer must have a power of attorney before he can receive them. (a) *Reeder v. Bloom.* (b)

Mr. *Sugden*, and Mr. *Roupell*, against the petition:—In the case cited, the person who acted was an attorney, but had not taken out a certificate. Mr. Smith received payment of all the costs that were properly incurred. The costs which the order directs to be paid, are the costs properly incurred, that is, through a solicitor of this court. Nobody but a solicitor of this court, can carry in a bill of costs. Others are expressly prohibited by 37 Geo. 3, c. 90. Double and treble costs are, in fact, damages, and payment of them could not be obtained, unless the plaintiff had employed an attorney. Robins could not have maintained an action, against the petitioners, for his costs; the act of parliament prohibits it. These petitioners are entitled to be paid the costs they have properly incurred, namely, those of the clerk in court; but, as to the others, there was no debt contracted, because Robins was doing what the law prohibited. Admitting that the costs are the costs of the party, still they must be incurred to a solicitor. The question is, whether there was an obligation, upon the petitioners, to pay these costs. Now it is admitted that Robins could not have maintained an action for them; but then they say that they have paid him. They however can have no \*higher right [\*249] than Robins had; they have, therefore, paid what was not legally due; and, as Robins had no right to enforce payment, they can have no demand.

The VICE-CHANCELLOR:—It never could be intended, by the order for taxing the costs of the parties in this cause, to make it imperative on the master to receive a bill of costs, which has been carried in by a person who was not a solicitor at the time when any portion of the costs was incurred. This court would not allow a person to have his bill of costs taxed as a solicitor, who, in point of fact, was not a solicitor; and I therefore think that the master's certificate is right. [1]

(a) Pract. Reg. 406, and Beames on Costs, 249.

(b) 3 Bing. 9.

[1] Affirmed, 1 Russ. & M. 744. See also *Coates v. Hawkyard*, id. 746; *Sumner v. Ridgway*, id. 748; *Memoranda*, post, 570.

1828 —Barker v. Barker.

## BARKER v. BARKER.(a)

1828; 22d and 23d April.—*Will.—Construction.—Tenant by the curtesy.*

Devise to A. and her heirs; but if she died leaving issue, then to such issue and their heirs. A. died, leaving issue. Held, that her husband was not entitled to be tenant by the curtesy.

RICHARD BOWYER SPENCE, deceased, devised as follows: "I give and devise all and every my messuages or tenements, buildings, closes, pieces or parcels of land or ground, and hereditaments, with the appurtenances, situate at Bodymoor Heath, in the parish of Kingsbury, unto my nephews and niece, Richard Barker, William Barker, Lewis Barker, James Barker, Ann Barker, Thomas Bloor, and William Bloor, and their heirs and assigns for ever, [\*250] to take and hold as tenants in common, and not as \*joint-tenants; provided also, and I do hereby declare that if any one or more of my said nephews and niece shall happen to die, leaving lawful issue of his or their body or bodies, then and in such case I give and devise the share or part, or shares or parts of him, her or them so dying, leaving such issue as aforesaid, of and in my said messuages, lands and premises at Bodymoor Heath aforesaid, to and among his or their child or children, and his, her or their heirs and assigns, if more than one child, to take and hold as tenants in common, and not as joint-tenants; but if but one, then to such one child, his or their heirs and assigns."

The testator made a codicil, which was partly as follows: "Whereas, by my said will, I gave and devised all and every my messuages or tenements, buildings, closes, pieces or parcels of land or ground and hereditaments, situate at Bodymoor Heath, in the parish of Kingsbury aforesaid, unto my nephews and niece, Richard Barker, William Barker, Lewis Barker, James Barker, Ann Barker, William Bloor and Thomas Bloor, their heirs and assigns for ever, as tenants in common, and not as joint-tenants; now I do hereby revoke the said gift and devise, and do hereby give and devise all and every my said messuages or tenements, buildings, closes, pieces or parcels of land, hereditaments and premises, situate at Bodymoor Heath, unto my said nephews and niece, Richard Barker, William Barker, Lewis Barker, James Barker, Ann Barker, William Bloor and Thomas Bloor, and their heirs and assigns, for ever, in the same manner, and subject to the proviso mentioned in my said will; and also subject to the payment of all and every my debts [\*251] \*due from me to any person or persons on bonds or notes."

Ann Barker married William Saunders and died some time after the testator. There was issue of the marriage, two sons. The testator's estate at Bodymoor Heath having been sold, under the decree in the cause, for payment of the debts with which it was charged, Saunders claimed to be entitled,

(a) The editor, owing to difficulty experienced in procuring the briefs, has been unable to insert this, and some of the other cases contained in this part, according to their dates.

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 1828.—*Barker v. Barker.*


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as tenant by the curtesy, to the dividends and interest of his late wife's share of the surplus of the purchase money.

Mr. *Duckworth*, for the children of Mr. and Mrs. Saunders, contended that Saunders was not entitled to be tenant by the curtesy of the share in question ; he cited *Sumner v. Partridge*.(b)

Mr. *Knight* appeared for William Saunders, and cited *Buckworth v. Thirkell*,(c) and *Moody v. King*.(d)

Mr. *Sugden*, Mr. *Phillimore*, and Mr. *Norton*, appeared for some of the other parties in the cause.

23d April.—The VICE-CHANCELLOR :—The question that was argued before me in this case, arose on this passage in the will: "I give and devise all my messuages or tenements, buildings, &c." It appears that one of the devisees married, and died leaving issue ; and the question is, whether her husband is entitled as tenant by the curtesy. Now that depends upon what is laid down by Littleton, \*sect. 35. So that the question is reduced to this ; whether [\*252 the wife, who has issue, has such an estate, as on her dying, the issue will inherit.

It was said that this case was decided by *Sumner v. Partridge*, where there was a devise to A. and her heirs, and, if she died before her husband, he was to have 20l. a year for life, remainder to go to her children. A. did die before her husband ; but the court held that he was not tenant by the curtesy. In opposition to that case, two cases were cited. The first was *Buckworth v. Thirkell*, where an estate was devised to trustees, in trust for Mary Barnes, till she attained twenty-one or married, and then to the use of her and her heirs, with a devise over, in case she died under the age of twenty-one, and without leaving issue. The events were that she married, and had a child ; the child died, and then the mother died under twenty-one ; and the question was, whether the husband was entitled to be tenant by the curtesy ; which entirely depended upon whether she had such an estate, as, by possibility, her issue might inherit. That case was twice argued ; and Lord Mansfield says that, during the life of the wife, she continued seised of a fee simple to which her issue might, by possibility, inherit ; and had she attained twenty-one, her vested estate would have descended on her issue. The consequence was, that her husband was held to be entitled to be tenant by the curtesy. The second case was *Moody v. King* ; where there was a devise to W. Frost, and his heirs ; but if he should have no issue, the estate devised was, on his decease, to become the property of the heir at law. Now it is manifest that W. Frost had an estate that might have descended on his issue, and that, on \*his dying without issue, that estate determined. But it was, [\*253 nevertheless, held that his widow was dowable. But these two cases are distinguishable from *Sumner v. Partridge*, and from the one now under con

(b) 2 Atk. 47.

(c) 3 Bos. & Pull. 652, note.

(d) 2 Bing. 447. See 2 Roper on Bar. & Feme, Mr. Jacob's ed. Addenda, No. 2.



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 1828.—Gordon v. Calvert.
 

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sideration. For in *Sumner v. Partridge*, and the case now before me, the children take by force of the gift: in the two other cases, the devise over was to other persons. It is clear, therefore, that the estate which the wife had is determined by her dying leaving issue, by which the children take, as purchasers, by force of the gift. Therefore the wife had not such an estate as could descend to her children, they taking as purchasers. The consequence is, that the husband is not entitled to be tenant by the curtesy.[1]

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### GORDON v. CALVERT.

1828; 2d May.—*Principal and surety.*

A., on taking B. as a clerk, took a bond from him and a surety, to secure his duly accounting for his receipts. No time was fixed for the continuance of the service, but it was to be determinable at the option of either party. The surety died. His executrix gave notice to A. that she should no longer consider herself liable on the bond, A. read the notice to B., and required him to execute a new bond, with another surety, which was done. Then B. died, and deficiencies were found in his accounts, subsequent to the notice. An injunction obtained, as of course, by the executrix, to restrain an action on the bond, was dissolved.

IN May, 1820, Alexander Gordon, together with Richard Edwards and Samuel Kent, executed a joint and several bond, to the defendants Calvert and Foster, in the penalty of 2,000l: and, after reciting that the firm of Felix Calvert & Co. had agreed to take Edwards into their service, as a collecting clerk, in their business of a brewer, the condition of the bond was declared to be, that if Edwards should, during his continuance in the service of the firm, duly account for all moneys received by him on their account, then the bond should be void.

[\*254] \*Edwards was not taken into the service of the firm for any definite period of time, but only during the pleasure of his employers, and he was at liberty to quit their service, at any time, at his own pleasure.

Gordon died in October, 1821, and, shortly after his decease, the plaintiff, his widow and executrix, wrote a letter to the firm, by which she informed them of the death of her husband, and that she should not consider herself liable, as a surety for Edwards, any longer. The letter was received by the house of Calvert & Co., and its contents were communicated, by one of the partners, to Edwards, and a conversation took place between them on the subject of the letter, but no answer was returned to it.

In consequence of the death of Gordon and the receipt of the letter, Calvert & Co. required further security from Edwards: upon which he procured a Mr. James Ives Edwards to become surety for him; and, in January, 1822,

[1] As to the seisin requisite to constitute a tenant by the curtesy. See *Elsworth v. Cook*, 8 Paige, 643. *Jackson, ex dem. Beekman, v. Sellick*, 8 Johns. Rep. 262. *Jackson, ex dem. Stewart v. Johnson*, 5 Cow. 74.

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James Ives Edwards executed to the defendants, Calvert and Foster, a bond in the penalty of 2,000*l*, with a condition to the same effect as the condition of the former bond. This new bond recited the bond of, May, 1820, the death of Alexander Gordon, and that Edwards had, thereupon, proposed to Calvert and Foster, that James Ives Edwards should enter into the new bond, as an additional and further security with the recited bond, for the purposes in the condition thereof expressed, to which James Ives Edwards had consented.

Kent, the other surety in the bond of May, 1820, and James Ives Edwards both afterwards died, but, on \*neither of their deaths was [\*255] any further security required from Richard Edwards, by Calvert & Co. In May, 1826, Richard Edwards himself died, and after his death, deficiencies were discovered in his accounts, to the amount of between 1,700*l*. and 1,800*l*., all of which, except some trifling sums, arose after the receipt, by the defendants, of the plaintiff's letter.

The bill, after stating these facts, prayed for an injunction to restrain an action on the bond, brought by the defendants against the plaintiff, and that the bond might be delivered up.

The answer admitted the statements of the bill ; but said that the defendants did not recollect the particulars of the conversation referred to in the bill, and that they did not, by requiring the further security, intend to release either Gordon's estate, or the plaintiff, as his executrix.

The plaintiff obtained the common injunction for want of an answer ; and the defendants having afterwards put in their answer, and obtained the rule *nisi* for dissolving the injunction, the plaintiff now showed cause on the merits.

The *Attorney-General*, Mr. *Treslove*, and Mr. *Swann*, for the plaintiff :—In consequence of the letter written by the plaintiff to Calvert & Co., the bond of January, 1822, was substituted for the prior one. How then can Gordon's estate be liable for any defaults except those that happened prior to the sending of that letter. The action, however, has been brought, against the plaintiff, for \*defaults committed subsequent to the receipt [\*256] of the letter, and to the substitution of the new bond for the original one. By the condition of that bond, no time was fixed for holding the parties to their liability. Calvert & Co. were at liberty to discharge Richard Edwards whenever they thought proper. Why was not the surety to have the same liberty to discharge himself from his liability ? (a) *Wright v. Morley*, (b) *Wright v. Simpson*. (c)

The case of *Shepherd v. Beecher* (d) will be cited for the defendants. But that case is distinguishable from this ; for there the security was given for a definite period of seven years. Suppose that Edwards had been guilty of embezzlement, and that Calvert & Co. had continued to employ him, would not the plaintiff have had a right to insist upon their determining her liability ;

(a) *Comes Ranelagh v. Hayes*, 1 Vern. 190.

(c) 6 Ves. 714.

(b) 11 Ves. 12.

(d) 2 P. W. 238.

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 1828.—*Williams v. Thorp.*


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and, if she had that right under one state of circumstances, why might she not have the same right under another state of circumstances? Calvert & Co. led her to suppose that the notice was sufficient. They read over the letter to Edwards, and required him to procure a new bond. Under these circumstances the plaintiff's liability ceased on the receipt of the letter.

Mr. Sugden, and Mr. Garratt, for the defendants, were stopped by the court.

The Vice-Chancellor, after stating the case, said that, by the original contract, the liability of the surety was to continue as long as Calvert & Co. [\*257] kept Richard Edwards, or he choose to remain in their service: that after Calvert & Co. had received the plaintiff's letter, they never gave her any intimation that they did not consider her as continuing liable under her husband's bond: that their conduct did not operate, in any manner, upon her: and that therefore the injunction ought to be dissolved.[1]

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#### WILLIAMS V. THORP.

1828; 5th May.—*Bankrupt.—Policy of assurance.*

The assignment of a policy of assurance on a life does not take it out of the order and disposition of the assignor, if no notice of the assignment is given to the insurers.

By a policy of insurance, dated the 27th of October, 1798, under the hands and seals of two of the trustees of the Equitable Assurance Society, the trustees, in consideration of the annual premium of 27*l.* 5*s.* 6*d.* to be paid by John Newman, assured unto him the sum of 1000*l.* to be paid to his executors, administrators, and assigns, within six months after his decease.

Newman being indebted to the defendants Joseph Thorp, and John Thomas Thorp, and Charles Henry Thorp, deceased, by an indenture dated the 8th of August, 1820, assigned this policy, together with another policy of the London Life Assurance Company, to Charles Henry Thorp, and Joseph Thorp, subject to redemption upon payment of 2,030*l.* and interest.

Soon after the execution of the assignment, Newman having paid off part of the debt, Charles Henry Thorp and Joseph Thorp delivered up to him the policy effected with the London Life Assurance Company, but retained possession of the other policy, as a security for the remainder of the debt.

[\*258] \*No notice of the assignment was ever given to the Equitable Assurance Society. In November, 1821, Newman became a bankrupt, and the plaintiffs were chosen his assignees. The policy was afterwards sold, by auction, to Mr. Briggs for 1,000*l.* Briggs and the auctioneer were made defendants to the bill; but, upon the deposit and balance of the purchase money being paid by them into court, and an assignment of the policy being

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executed to Briggs, by all proper parties, the bill was dismissed as against them.

The bill alleged that the bankrupt, at the time of his bankruptcy, was left in the apparent ownership of the money secured by the policy, and that the right thereto, thereupon, passed to the plaintiffs as the assignees under the commission.

The bill prayed that the Thorps might be ordered to join with the plaintiffs, in an assignment of the policy, to Briggs, and to deliver it up to him upon payment of his purchase money; and that the plaintiffs, as assignees of the bankrupt, might be declared to be entitled to receive such purchase money; and that the same might be paid to them accordingly.

The defendants, by their answer, said that assignments or transfers of policies of assurance granted by the Equitable Assurance office, were never entered in any books belonging to that society, or in any manner noticed by it; and that there was not any rule or regulation of the society, requiring them to be so entered, or any book kept, by the society, for any such entry; but that all right and interest in and to every policy of assurance was effectually assigned by the delivery of \*the policy of assurance, and the usual [\*259] assignment thereof; and that it never was, nor, is, necessary for any person to whom such assignment is made, to have his name entered in any book belonging to the society, or to be in any manner known, to such society, as the holder of the policy: that, at the time, and on the occasion of the execution of the assignment, Newman delivered to Charles Henry Thorp, and the defendant Joseph Thorp, the policy of insurance effected at the equitable office, and also the other policy; and that the former policy had continued in the possession of Charles Henry Thorp, and Joseph Thorp, during the life of Charles Henry Thorp, and that, since his decease, it had been and was then in the possession of the defendant Joseph Thorp: that no notice was given to the Equitable Assurance Company, or their trustees or agents, of the assignment of that policy, nor was any entry of such assignment made, in the books of the company, but that Joseph Thorpe had paid to the Equitable Assurance Company, the two years annual premium which became due on the policy, in the months of October, 1822 and 1823; and that, according to the rules and regulations of the Equitable Society, it was not necessary, in order to give effect and validity to the assignment, that the same should be entered in any book belonging to such society, and that, in fact, the Equitable Society had not any book wherein to enter the assignment of their policies; and that, when assignments of their policies were made, it was not usual or necessary, in any manner, to apprise the society of such assignments; that, at the time of the issuing forth of the commission of bankruptcy, Newman was indebted to Charles Henry Thorp and Joseph Thorp, in the sum of 1,400*l.* being the residue, then remaining due, \*of the debt, for the securing of which, Newman [\*260] had executed the assignment and delivered to them the policies of insurance; and that, at that time, the policy effected with the Equitable Soci-

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ety, was in the hands of Charles Henry Thorp and Joseph Thorp, as a security for their debt ; and that, therefore, the bankrupt was not, at the time of his bankruptcy, left in the apparent ownership of the policies, or of the money secured by it : and that the right thereto did not pass to the plaintiffs, as the assignees under the commission : that there was still due and owing to Joseph Thorp, as having survived Charles Henry Thorp, upon the security of the assignment, the sum of 1,460*l.* including the premiums paid on the policy since the assignment thereof.

Arthur Morgan, who was both a clerk and joint actuary of the equitable office, was examined for the defendants. He deposed that it was not usual or customary, and that the rules and regulations of the society did not require that, in order to give effect or validity to assignments of their policies, notice should be given of such assignments to the society : that although notice of assignments of policies effected with the society, was sometimes given to the society, yet the society had not any books or registers of such notices.

Mr. Sugden and Mr. Pemberton, for the plaintiffs :—It has been decided that, if upon the assignment of a debt no notice of the assignment is given to the debtor, the debt remains in the order and disposition of the assignor.<sup>(a)</sup> It

may be said, that the equitable assurance society is a partnership : and [\*261] so it is, for it is a \*company formed for mutual assurance. But how

does that differ the case ? It is immaterial in what manner the party to be paid is connected with those who are to pay him. Can a partner assign his share without notice to his co-partners ? Where debts due on the dissolution of partnership are assigned without notice, they remain in the order and disposition of the assignor. *Ex parte Usborne.*<sup>(b)</sup> The question here is, whether the assignment of this policy, without notice to the trustees of the society, takes it out of the order and disposition of the party who makes the assignment. The assignment is a valid one, although the thing assigned is not taken out of the order and disposition of the assignor. If the insurer had died within an hour after the assignment, and no notice of the assignment had been given to the trustees, they might have safely paid the sum insured to his executors. So, if the company had purchased the policy after it had been assigned without notice to them, it would have been binding upon the assignee, because he had not done all that was necessary to prevent the assignor from receiving the amount of the policy. The society, not having notice of the assignment, might have safely paid it to the assignor, and therefore the policy remained in his order and disposition. The Vice-Chancellor :—The policy was actually delivered to Charles Henry Thorp and Joseph Thorp.

It was so : but if the policy had been lost, the company would, upon proper evidence of that fact, have paid the amount to the insurer. The delivery of the policy does not take it out of the order and disposition \*of [\*262] the insurer. To produce that effect, notice of the assignment must be

(a) *Ex parte Monro*, 1 Buck. 300.

(b) 1 Glyn. & Jam. 358.

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given to the society. *Ex parte The Vauxhall Bridge Company.*(c) There is no difference between this policy and a post obit bond.

Mr. *Horne* and Mr. *Barber*, for the defendants :—A bond and a policy of insurance stand on quite a different footing. A bond is altogether personal. No property is, either directly or indirectly, connected with it, but as it may be recovered by putting the bond in suit. A bond is an existing debt ; nothing further is required to keep it in force. On a policy, premiums are to be paid, yearly, to keep it on foot.

The policy is a covenant with the insured and his assigns ; the latter, therefore, may maintain an action on the policy against the insurer. No person can claim the sum insured except according to the tenor of the policy ; therefore neither Newman nor his assignees can strike the word “ assigns ” out of the instrument, and say that it is not an assignable interest.

The VICE-CHANCELLOR :—Does the deed, constituting the society, contain any stipulation as to the assignment of policies ?

None at all. It appears, by Morgan’s evidence, that if notice had been given of the assignment, it would not have been attended to. Notice amounts to nothing, unless the office could be affected by it. The Bank of England is never bound by notice, on account of the \*extent of its transactions. [\*263] *Ex parte Richardson :* (d) how, then, can the equitable office be held to be bound by it ? The office would not have purchased the policy, nor could any one have obtained payment of the sum insured, without a production of the policy, and of the receipts for the premiums. Every thing has been done, in this case, that the nature of the property admitted of to vest the policy in these defendants.

The VICE-CHANCELLOR :—The question in this case is concluded by the decisions in the cases that have been cited for the plaintiffs.

In *Ex parte Munro*, the Vice-Chancellor says ; “ Did the delivery of the bond by the bankrupt, take away his power to receive the debt ? Certainly not.” Supposing that the executor of Newman had obtained payment of the sum insured from the office, could the office have been compelled to pay it over again to Thorp ? I see no ground upon which the office could have been compelled to make a second payment. If this society does not take notice of assignments, it takes all the risk of such conduct upon itself. It appears to me that the question that has been discussed, is concluded by authority.

Declare the plaintiffs entitled to the benefit of the policy of insurance.[1]

(c) 1 Glyn & Jam. 101.

(d) 1 Buck. 480.

[1] Vide *Memoranda*, post, 570. As to the effect of notice from the assignee to the holder of the fund, *Dearle v. Hall*, 3 Russ. 1. *Loveridge v. Cooper*, id. 33. *Cooper v. Fynmore*, id. 60. *Foster v. Blackstone*, 1 Myl. & K. 297. *Greening v. Bukford*, 5 Sim. 195. *Malcolm v. Charlesworth*, 1 Keen, 72. *Foster v. Hargreaves*, id. 281, 287. *Timson v. Ramsbottom*, 2 Keen, 35. *Jones v. Jones*, 8 Sim. 633. *Gregory v. West*, 2 Beav. 541. *Douglas v. Russell*, 4 Sim. 524.

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1828 — Bradford v. Belfield.

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[\*264]

**\*BRADFORD V. BELFIELD.**1828; 18th and 29th January.—*Trust.—Will.—Construction.*

A trust for sale vested in A. and his heirs, cannot be executed by an assign of A.

Testator gave, to his heir, one shilling, and devised to W. B. all his lands; and, in the next sentence, gave to him all his goods, chattels, personal and testamentary estate; held that the fee simple of the lands passed to W. B.

By indentures of lease and release, dated the 9th and 10th of October, 1794, Nicholas Prout Berry, in order to secure the re-payment of a sum of money advanced to him by William Baker, conveyed an estate, in Devonshire, to George Whidborne (a trustee for Baker) his heirs and assigns; and, by the indenture of release, it was provided and declared that the conveyance was so made as aforesaid to Whidborne and his heirs, upon special trust and confidence in him the said George Whidborne and his heirs reposed, and to the intent and purpose only that he and they should, as soon as to him and them should seem meet, upon request to him or them for that purpose made by Baker, his executors, administrators and assigns, make absolute sale and disposal of the fee simple and inheritance of the estate, in such lots as he and they should think proper, and, out of the purchase money, in the first place, deduct to him the said George Whidborne, his heirs, executors and administrators, the expenses of executing the trusts, and next, to pay to Baker the principal and interest due to him; and it was provided that the purchasers under the indenture, paying their purchase money to Whidborne, his heirs, executors, administrators and assigns, should not be obliged to see to the application thereof; but that the receipts of Whidborne, his heirs, executors, administrators and assigns, should be sufficient discharges to them for the same.

[\*265] \*Whidborne afterwards died intestate as to the estate in question.

Nicholas Prout Berry, by his will, dated the 25th of January, 1803, and duly executed and attested to pass real estates, gave to his brother, Thomas Berry (his heir at law) the sum of one shilling; to his brother, George Berry, the sum of 10*l.* a year, to be paid out of two fields, called Rorsden and Ridge, (which were no part of the estate in question :) and then concluded his will in the following words:—"I give, unto my brother, William Berry, all my lands, messuages and tenements whatsoever; also all and singular my goods and chattels, personal and testamentary estate whatsoever, I give and bequeath unto the said William Berry, whom I make and constitute whole and sole executor of this my last will and testament."

After the testator's decease the executors of Baker, (who was then also dead,) assigned, the principal and interest secured by the indentures of October, 1794, to the plaintiff, Nicholas Baker; and, in November, 1815, Whidborne's heir, at the request, and by the authority of the executors only, conveyed the estate to the plaintiff, Bradford, in fee, in trust to sell, and out of the proceeds of the sale, to pay the principal and interest to Nicholas Baker. By a deed dated in April, 1823, William Berry claiming to be entitled to the property under the

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will of Nicholas Prout Berry, subject to the conveyance made in 1794, in consideration of a further advance of money made to him by Nicholas Baker, confirmed the estate vested in Bradford, and gave him new powers of sale for raising the money originally lent by William Baker, and also the sum afterwards lent by Nicholas Baker.

\*In September, 1823, Bradford, in performance of the trust reposed [\*266] in him, sold the estate to the defendant Belfield: and he having refused to complete his purchase, this suit was instituted to compel him to do so. The master to whom the title had been referred under the decree reported in favor of it; upon which the defendant excepted to the report.

Mr. Sugden, and Mr. O. Anderdon, for the defendant, in support of the exceptions:—The power of sale in the release of 1794, is a very peculiar one. The plaintiffs contend that it authorized a sale by Bradford; but that we deny. Whidborne and his heirs might have sold the estate, but his assigns could not: for the power of selling is confined to Whidborne and his heirs. The trust vests an important discretion in Whidborne, by authorizing him to decide as to the lots in which the estate was to be sold. *Townsend v. Wilson*, (a) *Hall v. Dewes*, (b) *Sharp v. Sharp*, (c) *Perkins*, sect. 553, *Keilway*, 43, b.. *Mansel v. Mansel*, (d)

Then another point is made, namely, that the devisee of Nicholas Prout Berry confirmed the estate and the powers of sale vested in Bradford. But the question is, whether the fee simple did pass to the devisee under that will. The testator makes two gifts, in two distinct sentences. The former sentence relates to the testator's real estate, which is disposed of in words not sufficient to pass the fee simple. The expression "testamentary estate," therefore, which is used in the latter sentence, cannot relate [\*267] to lands; William Berry, therefore, takes a life interest only in the testator's real estate. *Smith v. Coffin*, (e) *Doe v. Gilbert*, (f) *Doe v. Buckner*, (g)

Mr. Preston, and Mr. Ching, for the plaintiffs, in support of the master's report:—The word "estate," in whatever part of a sentence it may be found, has been always held to relate to real estate, especially where it is coupled with the word "testamentary." *Ibbetson v. Beckwith*, (h) *Tanner v. Morse*, (i). It is a clear and acknowledged rule that, in construing a will, effect must be given to all the words, and none be rendered nugatory. But if the words "testamentary estate" do not carry realty, then some of the words in this will will be rendered nugatory. The gift of a shilling to the heir, shows that the testator intended to disinherit him. *Doe v. Lainchbury*, (k) *Doe v. Langlands*, (l) *Patton v. Randall*, (m) *Huxtep v. Brooman*, (n) *Tilley v. Simpson*, (o) *Hogan v. Jackson*, (p) *Doe v. Gilbert*, (q)

(a) 1 B & A. 608.

(d) Wilmot's Cases, 36.

(g) 6 T. R. 610.

(k) 11 East, 290.

(e) 3 T. R. 659, note.

(b) Jacob's Rep. 189.

(e) 2 H. Black. 444.

(h) Ca. Temp. Talb. 157.

(l) 14 East, 370.

(p) Cowp. 299.

(c) 2 B. & A. 405.

(f) 3 Brod. & Bing. 85.

(i) Ibid 284.

(m) 1 Jac. & Walk. 169.

(q) 3 Brod. & Bing. 85. (n, 1 Brn. C. C. 437.



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Next as to the other question : whether this trust is of such a nature as to be incapable of being delegated. If Whidborne had devised this estate, specifically, can it be denied that the devisee would have been the person to execute the trust ? The nature of this trust is not so personal that it cannot [\*268] be delegated. The object of the \*trust was only to raise money.

The mortgagee nominated the trustee. Then how can he be held to be the confidential trustee of the mortgagor ? If the trustee had proceeded to make an improvident sale, he might have been enjoined by this court. It is admitted that Whidborne's heir might have sold ; and so might the heir of that heir. What was the special confidence reposed in them ? In that part of the trust for sale which authorizes the deduction of the expenses, the words : "heirs, executors, and administrators" are used, and, in the proviso as to the receipts, the same words occur. Then, surely, it is to be supposed that the word "heirs" in the former part of the trust, must be held to extend to assigns. It is not merely a power, but a trust ; and what reason could there be to enable the assigns to give receipts for the purchase money, if they were not to sell the estate.

The deed of 1823 cures any defect that might arise under the release of 1734.

Mr. *Sugden*, in reply :—The object of interposing a trustee was that he might be a safeguard to the mortgagor. The trust for sale is, in every part of it limited to the heirs of Whidborne. But it is said that the word "heirs" includes devisees That I do not admit. *Cole v. Wade*.<sup>(r)</sup> There was a personal confidence reposed here ; and no two persons might, perhaps, agree as to the proper time and mode of sale. But supposing that the devisee of

Whidborne might have executed the trust, there is no such devisee [\*269] here. The heir has no greater power \*than the ancestor had ; and if the ancestor could not have transferred the trust, the heir could not do it. Now it is clear that the ancestor could not have appointed a new trustee.

As to the argument raised upon the use of the word "assigns" in the receipt clause, it is answered by the decision in *Townsend v. Wilson*, which was followed by Lord Eldon, C. in *Hall v. Dewes*.

Next as to the effect of the devise to William Berry. In *Smith v. Coffin*, there was nothing for the words to operate upon, except the estate in question in that cause. *Doe v. Gilbert* is a very unsatisfactory decision. It was decided upon the introductory words of the will. Here it is conceded to us that, under the words : "I give unto my brother William Berry, all my lands, messuages and tenements whatsoever," an estate for life only passed ; and it may be fairly inferred, from what Richardson, J. is reported to have said in delivering his judgment in *Doe v. Gilbert*, that, if that learned judge had had to decide this case, he would have held that the fee did not pass to William Berry. I

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apprehend that there is some inaccuracy in the report of the judgment referred to. It is quite clear that the opinion of the learned judge was founded on the introductory clause. The giving of a shilling to the heir cannot be adverted to, either with regard to the real or the personal estate. It has been decided, after great consideration, in *Doe v. Dring*,<sup>(s)</sup> that a devise of all a testator's effects of what nature or kind soever, will not \*pass a real estate, where [\*270] it cannot be collected from the will, that the testator intended that it should pass. Nobody can doubt that the testator, in this case, thought that he had given his real estate under the devise of all his lands, messuages and tenements whatsoever; besides the appointing of executors is included in the same sentence as the subsequent gift. As it cannot be denied that, under the word "goods," all the personal estate passes; the words personal and testamentary estate, which are coupled together, are surplusage. It was decided in *Roe v. Yeud*,<sup>(t)</sup> that, although the words: "all the remainder of my property," would have passed real estate, if taken abstractedly, yet they were so connected with other words in the will, that they could not pass it.

At all events, the questions in this case are of too grave a nature for the court to compel a purchaser to take the title.

The Vice-Chancellor, after stating the trust for sale, the receipt clause in the release of 1794, and the conveyance by Whidborne's heir to Bradford, and remarking, that the heir of Nicholas Prout Berry, was not a party to it, continued as follows: the question is, whether Bradford, who was the assign of the heir of Whidborne, is able to make a title to the estate contracted to be sold. It has been argued that, notwithstanding the trust is, by the words of the deed, expressly confined to Whidborne and his heirs, according to the true construction of the instrument, his assigns might make the sale, especially as the proviso makes \*the receipts of his assigns, sufficient discharges [\*271] for the purchase money.

The necessity of discussing this point upon principle, is superseded by the decision of the court of king's bench in *Townsend v. Wilson*, and, as the judgment in that case remains unreversed, it decides the question now under consideration. It has been correctly stated that, in *Hall v. Dewes*, Lord Eldon, C. did not approve of that decision: but his lordship felt himself bound by it, so that he would not compel the purchaser, in that case, to take the title. Now, in *Townsend v. Wilson*, the power of sale was given to three trustees and their heirs; and the money to arise by the sale was directed to be paid to the trustees and the survivors or survivor of them; so that, in that case, there was the very distinction that occurs in this. One of the trustees died; and the power was exercised by the two survivors; and the question was, whether that was a good execution of the power. The court of king's bench determined that it was not a good execution of the power. I, therefore, feel myself bound by the authority of

(s) 2 M. &amp; S. 448.

(t) 2 N. R. 214.

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 1828.—Lord v. Sutcliffe.
 

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*Townsend v. Wilson*, to say that, as far as the first point is concerned, the title is not good.[1]

But it is admitted that the defect will not be cured, if the court should be of opinion that, under the will of N. P. Berry, the equitable fee passed to William Berry.

Now N. P. Berry made his will, by which, &c. [His Honor here read the will.] If I had to determine the point myself, I should feel bound, by the decision of the court of common pleas in *Doe v. Gilbert*, to hold that, [\*272] under this will, the inheritance of the lands did \*vest in William Berry; for it appears to me that there is no substantial distinction between the terms of the devise in question, and of the one in the case referred to. The difference between the two wills consists in this; the one begins with an expression of intention to dispose of the whole of the testatrix's temporal estates, but contains no gift of a nominal sum to the heir at law; the other has no introductory clause, but contains a gift of a shilling to the heir. Now, though the gift of a nominal sum to the heir may not have the effect intended, namely, to disinherit the heir, yet it may be received to aid the construction of doubtful words. Upon the whole, therefore, I see so little substantial distinction between the two cases, that, if it were left to me to decide, I should say that the devise to William Berry has had the effect of curing the defect in the title. I do not, however, feel myself authorized to compel the purchaser to take the estate; but, as the question is, in fact, a legal one, it is my duty to send a case for the opinion of a court of law, as to the effect of the devise to William Berry.

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No case appears to have been stated for the opinion of a court of common law; for, on the 31st of January, 1828, the cause came on for further directions, when a decree was made for a specific performance of the agreement.

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[\*273]

LORD v. SUTCLIFFE.

1828; 3d May.—*Legacy*.

A testatrix by her will gave to T. L. 50 shillings a month during his life, in lieu of his giving up all other notes and claims, and, by a codicil, she gave him 3l. a month during his life, and concluded by directing that all other things should be paid and done as directed by her will: held that T. L. was entitled to both the monthly payments.

MARY LORD made her will, dated the 14th of November, 1817, and which was, partly, as follows: "I do hereby give and bequeath unto my nephew, Thomas Lord, 50s. a month, the term of his natural life, to be paid to him monthly after my decease, in lieu of him giving up all other notes and claims:

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[1] Vide *Downing v. Rugar*, 21 Wend. 178. *Sharpssteen v. Tillou*, 3 Cow. 651. *Jackson, ex dem. Hammond, v. Veeder*, 11 Johns. Rep. 169. *Osgood v. Franklin*, 2 Johns. Ch. Rep. 1. S. C. 14 Johns. Rep. 527. *Sinclair v. Jackson*, 8 Cow. 543. *Davous v. Fanning*, 2 Johns. Ch. Rep. 254.

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also, I give unto my niece, Mary Knowles, the daughter of my late niece Sally Lord, the sum of 150*l.* to be paid twelve months after my decease, if she is then living."

The testatrix afterwards made a codicil, dated the 16th of August, 1821, and which was as follows: "I do give and order that Mary, the daughter of John Knowles, have 200*l.* twelve months after my decease, if she is then living: also I gave Sally, the daughter of Thomas Lord, 200*l.* after her father's decease: also, to Thomas Lord I give and order that he shall have 3*l.* a month, the time of his natural life: also I give, unto the chapel at Mill Wood, 60*l.*; and all other things to be paid and done as the will hereto directs."

The bill was filed, by Thomas Lord, against the testatrix's executor, praying for the usual accounts of the testatrix's personal estate and effects, and that the trusts of the will and codicil might be carried into execution, and that funds might be set apart to secure the monthly payments of 50*s.* and 3*l.* to the plaintiff. The question in the cause was, whether the plaintiff was entitled to both monthly payments, or to the latter of them only.

\*Mr. *Pepys* and Mr. *Duckworth*, for the plaintiff, relied on *Hurst v. [274] Beach*.(a)

Mr. *Spence*, for the defendant, said that the peculiar wording of the codicil varied this case from *Hurst v. Beach*; and that the testatrix did not intend that the plaintiff should have both the monthly payments, but only to increase the 50*s.* to 3*l.*; and he cited *The Duke of St. Albans v. Beaucherk* (b)

The Vice-Chancellor said that this case came within the rule laid down by Sir John Leach, V. C. in *Hurst v. Beach*, and declared that the plaintiff was entitled to the several payments of 50*s.* and 3*l.* during his life.[1]

(a) 5 Mad. 351.

(b) 2 Atk. 626.

[1] Vide *Spire v. Smith*, 1 Beav. 419. *Mackenzie v. Mackenzie*, 2 Russ. 262. *Hemming v. Gurrey*, 2 Sim. & Stuart, 311. Affirmed, 1 Bligh, N. S. 479. Upon the question whether a legacy is cumulative or substitutional, the object of the court will be to ascertain the testator's intention, which can only be done by a close and critical examination of the language used in the testamentary instruments. *Guy v. Sharp*, 1 Myl. & K. 589. Where equal sums were given to the same person by a will and codicil, it was held, from the character and objects of the latter, to be substitutional and not accumulative, although the legacy given by the codicil was only conditional. "The principle," says Ld. Ch. Lyndhurst, "of all the cases on this subject depends upon the question, whether you can collect from the whole of the instruments taken together, an intention on the part of the testator to substitute the one legacy for the other." *Fraser v. Byng*, 1 Russ. & M. 90. When a testator makes distinct gifts by distinct codicils, the presumption is that the subsequent gifts are additional, and that the testator, when he made the last, had not forgotten the former, and did not mean to make the last either in vain, or in substitution for the former; but this presumption may be strengthened or rebutted by any circumstances which by just inference and presumption, may enable the court to ascertain the real intention of the testator? The nature of the legacies and the extent of interest in them which are given are very material circumstances, but the court also regards the situation of the testator with respect to the persons for whom he is making provision, and the other directions which he may have given. *Robley v. Robley*, 2 Beav. 95. Lord Brougham refused evidence of the testator's declarations. *Guy v. Sharp*, ubi sup. Lord Langdale held that extrinsic evidence is admissible to show the circumstances of the testator at the time of making his will, so as to enable the court to place itself in the situation

1828.—*Mortimer v. West.*

## MORTIMER v. WEST.

1828; 17th and 26th April.—*Will.—Construction.—Legacy.*

Devise to A. B. C. &c. share and share alike, for their lives, remainder to their respective children, for their lives, and so to be continued, from issue to issue, for life. But if any of them die, leaving no issue, their shares to go to the survivors, for their lives, and the issue of such of them as shall be dead, and, for default of any issue then over. Held, that A. B. C. &c. take estates tail, with cross-remainders.

Testator, by his will, gave an annuity payable out of his freehold, copyhold, and personal estate, and, by a codicil, not duly attested, revoked the annuity. Held, that it was a subsisting charge upon the freeholds.

RICHARD MORTIMER, deceased, by his will, disposed of his real estates and the residue of his personal estate, in the following words:—

“I give and devise to William West, John Scales, Richard Laycock and William White, all those my freehold, copyhold and leasehold mes-  
[\*275] suages, lands, and tenements, \*with the appurtenances, situated at the half-way houses, Hampstead Road, at Kentish town, at Holloway, at Bethnal Green or Hackney, at Shoreditch and Whitechapel, in the county of Middlesex, and city of London, and elsewhere, and all other my estate and effects, real and personal, not hereinbefore disposed of, wheresoever the same may be, and of whatsoever the same may consist, which at the time of my decease I may be possessed of, entitled to or interested in, to hold such of my said estates as are real estates of inheritance, to the said William West, John Scales, Richard Laycock, and William White, and the survivors and survivor of them, their and his assigns for ever, without impeachment of waste, and to hold such of my estates as are leasehold, for the remainder of the several terms to come therein, upon the trusts, nevertheless, and to and for the intents and purposes, and subject to the provisos and declarations following, that is to say, upon trust, to sell, by public auction, all my stock, implements, and materials of all kinds, and all other goods and moveables not hereinbefore given and disposed of, and all such of my personal estate as does not consist of messuages, lands, moneys or annuities, or securities for money, and to collect and get in such debts and moneys as may be owing to me at my decease; and, after my decease, to place the amount or produce thereof out at interest on mortgage security, upon land in the county of Middlesex; and to let and receive the rents and profits of my said messuages, lands, tenements and hereditaments, as the same shall become due and payable, quarterly, and by and with the said rents and profits, interest moneys, annuities, and all and every sum and sums of money that may be accruing and payable, in the first place, to dis-  
[\*276] charge \*my just debts, funeral and testamentary expenses, legacies above given, and all payments charged on my said estates, or any of

of the testator; but it is inadmissible to prove either his motives or intentions. *Martin v. Drinkwater*, 2 Beav. 215. And see *Colpoys v. Colpoys*, Jac. 451. *Boys v. Williams*, 2 Russ. & M. 689, reversing S. C. 3 Sim. 563. *Lowe v. Lord Huntingtower*, 4 Russ. 532, n.

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them ; and, in the next place, to pay to my wife Mary one annuity or yearly sum of 150*l.* for the term of her natural life ; and also to pay to Martha Davies one annuity or yearly payment of 100*l.* during the term of her natural life ; and upon further trust, as to the residue of the net proceeds of the said rents and profits, interest and other moneys, (after discharging all necessary outgoings,) and as to the whole of the same rents, profits, and moneys, after the several deceases of my said wife Mary, and Martha Davies, to pay and divide the same, by quarterly payments as aforesaid, to and amongst Ann, the daughter of the said Martha Davies, Richard, the son of the said Martha Davies, John Treasure, the son of the said Martha Davies, James, son of the said Martha Davies, or such of them as shall be living at my decease, together with every child born of the body of the said Martha Davies, and living at my decease, or born and living within nine calendar months afterwards, share and share alike, for their several lives ; and from and after the decease of every of the said children of the said Martha Davies, whether before or after attaining the age of twenty-one years, leaving issue, the share of such child so dying to go and be divided equally between his or her children, whether sons or daughters, for life, share and share alike, if more than one, and if but one, then the whole share to such only child, for life, and so to be continued and distributed, in a descending line, *per stirpes*, from issue to issue, for life, so long as any issue shall be living descending from the said Martha Davies, the children of the parent dying to take such parent's share, equally \*between them, [\*277] in all cases of decease. But my will is, and I do direct that, in case any of the said children of the said Martha Davies, or their respective issue, shall die leaving no issue, then the share of him or her so dying shall go and be divided amongst his or her surviving brothers and sisters, equally, for their lives, and proportionably amongst the issue of such brothers and sisters as shall be dead, (if any,) according to the share the parent would have had if alive, and for default of such brother or sister, or their issue, then to fall into the gross produce of the rents and profits for the benefit of all those entitled to the distribution thereof as aforesaid. And I also direct that no child's share (except as after mentioned,) shall be payable till the age of twenty-one years ; but, in the mean time a proportionate part, if the whole shall be too large, at the discretion of my trustees, shall be applied for their education, maintenance, and putting out in the world, when they shall become of a proper age, and the residue of their share to accumulate from time to time, at interest, and be paid them at the age of twenty-one years, except in the case of females marrying before the age of twenty-one years, in which case such female's share shall be payable to them only, and their sole receipt be a discharge, exclusive of and not subject to any husband's debts, engagements, control or intermeddling ; nor shall the share of the said rents and profits and moneys, or any child's interest therein, be assignable, saleable, or in anywise transferable to any other person, nor any authority given for receipt of the same in case of residence at a distance, but what may be at any time revoked ; and, for default of any such

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issue descending and proceeding from the said children of the said [<sup>\*278</sup>] Martha Davies as <sup>aforesaid</sup>, then, whenever such an event shall happen, upon trust, to sell and dispose of, in suitable lots, all my freehold, copyhold and leasehold estates, and all my lands, messuages and hereditaments whatsoever and wheresoever, for the most money that can be reasonably gotten, and the purchase money arising from the lands and tenements in every separate parish, to be placed out, separately, at interest, in the names of the trustees or trustee for the time being, on some good mortgage security in Middlesex, and the interest arising therefrom to be made payable quarterly, and to be divided and paid by quarterly payments, amongst such and so many poor decayed housekeepers, or such as have been housekeepers, and then resident within the said parish, as my trustees may approve of and elect."

The testator, by a codicil not duly attested to affect freehold estates, revoked the annuity given by the will to Martha Davies.

The testator survived his wife, and died on the 9th of March, 1809. At his decease Martha Davies (who was a single woman,) had six children; namely, Richard Mortimer, James Mortimer, Thomas Mortimer, Jeremiah Mortimer, John Treasure Mortimer, and Ann, who was afterwards the wife of Richard Ford. All these children, except Thomas and Jeremiah, were born before the date of the will. John Treasure Mortimer afterwards died an infant, intestate, and without issue.

The bill was filed, in November, 1817, by the four surviving sons, [<sup>\*279</sup>] (all of whom, except Richard, were <sup>infants</sup>,) against the trustees and executors of the will, and Mr. and Mrs. Ford and their infant children. It charged that, upon a true construction of the will, all the clear residue of the testator's real and personal estates was given to the defendants, the trustees and executors, in trust, subject to certain charges, for the benefit of the plaintiffs and the defendant Ann Ford, as the five surviving children of Martha Davies, absolutely, and for their sole and entire use and benefit; but that the defendants, the trustees and executors alleged that the plaintiffs and defendant Ann Ford were only entitled to an estate and interest for their respective lives, in the real and personal estates of the testator, or in parts thereof, and that they were then given over to charitable purposes. Whereas the plaintiffs charged that, upon the true construction of the will, the whole of the real and personal estates were given to the plaintiffs and defendant Ann Ford, absolutely, but that, if not, then estates for life in the said property, were, by the will given to the plaintiffs and the defendant Ann Ford, in equal shares, with remainders, in such shares, to their children, as tenants in tail, or as quasi tenants in tail thereof.

The bill prayed that the will might be established: that the usual accounts might be taken of the testator's real and personal estates: that the rights of all parties under the will might be declared; and the residue of the testator's personal estate might be ascertained, and properly secured for the benefit of all persons interested therein.

1828.—Mortimer v. West.

Pending the suit, Richard Mortimer the younger, assigned, his share in the testator's real and personal \*estates, to one Morgan, to secure [\*280] 630*l.* and interest; and afterwards by his will, dated the 23d of November, 1818, (which was attested by two witnesses only,) gave all his interest in those estates to Martha Davies, Richard Dent, and Thomas Blyth, and appointed them his executrix and executors. On the 15th of August, 1819, Richard Mortimer, the younger, died without issue, upon which a bill of revivor and supplement was filed, stating these facts.

The master, in pursuance of a reference made to him by the decree on the hearing of the cause, reported that the testator left no heir at law or customary heir.

On the 3d of April, 1827, the cause came on to be heard before the Lord Chancellor, for further directions, when his Lordship ordered the cause to stand over, and that, in the mean time, the bill should be amended by striking out the names of the plaintiffs, Thomas and Jeremiah Mortimer, and making them defendants. The bill was amended accordingly; and, on the cause being heard, for further directions, the Lord Chancellor decided that those two children, being illegitimate, and born after the date of the will, took nothing under it

The cause now came on to be heard a second time, for further directions.

Mr. Sugden, Mr. Bickersteth, Mr. J. Martin, and Mr. Stuart, for the plaintiffs and the defendants Mr. and Mrs. Ford, said that the will first gave to the children of Martha Davies express estates for their \*lives; [\*281] but that the subsequent words enlarged those estates into estates tail.

Mr. W. Brougham, for the crown, contended, that the children took life estates only, and that the limitations to their issue were void. He cited *Seaward v. Willock*.(a)

Mr. Pepys, for the defendants, the children of Mrs. Ford, who were all born after the testator's decease, said that, according to the principle of the decree in *Humbertson v. Humbertson*,(b) Mrs. Ford took an estate for life under the will, with remainder to her children in tail.

Mr. Blackburn, for Martha Davies, contended that the annuity given to her by the will, was a subsisting charge upon the freehold estates; because the codicil by which the annuity was revoked, was not duly attested. *Buckeridge v. Ingram*,(c) and *Sheddon v. Goodrich*.(d)

Mr. Horne, Mr. Garratt, and Mr. Tinney, appeared for the trustees, and other parties.

Mr. Bickersteth, in reply:—It has been said that *Humbertson v. Humbertson* governs this case. But this is not a case of executory trust, as *Humbertson v. Humbertson* was. The devise in *Jesson v. Wright*(e) closely resembles

(a) 5 East, 198.  
(d) 8 Ves. 481.

(b) 1 P. W. 332.  
(e) 2 Bligh, 1.

(c) 2 Ves. 652.



1828 — Mortimer v. West.

the present one. It is clear therefore, that estates tail vested in the children of Martha Davies.

[\*282] \*Mr. *Pepys*:—There were no second life estates in *Jesson v. Wright*.

The VICE-CHANCELLOR:—In consequence of the Lord Chancellor's declaration, I am to consider this will as if the provision intended to be made by it, for the children of Martha Davies, who might be born after the date of the will, was not inserted.

In this will there is an evident and expressed intention that all the children who take in the first instance, and their children, should take estates for life. Now, in *Seaward v. Willock*, the court was compelled to say that, as there was a single intent to create a succession of life estates, which was not warranted by law,[1] Thomas Southcomb took an estate for life only in the property devised to him and his descendants. But here, besides the intention to give life estates, there is an intention that the estates shall not go over until there is a general failure of issue. That circumstance according to the judgment of Lord Ellenborough, C. J. in *Seaward v. Willock*, and the decision in *Jesson v. Wright*, compels me to hold that the persons who are to take under this will, take estates tail in the freeholds and copyholds. And it appears to me, on looking at the will, that there are cross remainders; and therefore, James Mortimer and Ann Ford take, each, a moiety of the real estates.

The case of *Humbertson v. Humbertson* is not applicable to the present case: for there the trust was executory: and, in those cases, the courts [\*283] adopt the doctrine of *cy pres*. That mode of construction is \*inapplicable where, as in this case, the devisees take, by direct devise to themselves.

Then with respect to the annuity given to Martha Davies. The will contains a direct devise to her of an annuity out of freehold, copyhold, leasehold, and personal estates. But the testator, by an instrument attested by one witness only, has revoked that devise; and, therefore, according to the decisions in the cases that have been cited in support of her claim, I hold that, as to the copyhold, leasehold, and personal estates, her annuity cannot exist; but that, as far as the freehold estates are concerned, it is a subsisting charge.

A question has occurred to me which was not argued, namely what estates the children of Martha Davies take in the leaseholds?

It might be contended, according to *Forth v. Chapman*,(f) that the gift over on dying without issue, might be confined to dying without issue living at that decease of the devisees; so that, as in *Forth v. Chapman*, there would be an executory devise as to the leaseholds, and an estate tail as to the freeholds. I think, therefore, that I had better suspend saying any thing as to the leaseholds.

The counsel declined to argue the point suggested by the Vice-Chancellor;

(f) 1 P. W. 663.

[1] Vide *Mackworth v. Hinman*, 2 Keen, 658. *Bengough v. Edridge*, 1 Sim. 173.

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 1828.—*Macartney v. Graham.*


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upon which his Honor decided that James Mortimer and Ann Ford, and the representatives of Richard Mortimer, took the leaseholds and personal estate equally.

“Declare the will well proved, &c. and that, upon the death of the [\*284] testator, the late plaintiff Richard Mortimer, the younger, together with the plaintiff, James Mortimer, and the defendant, Ann Ford, and J. Treasure Mortimer, deceased, became and were entitled to the testator's freehold and copyhold estates, as tenants in common in tail general, subject, as to the said freehold estates, to the annuity of 100*l.* to the said defendant Martha Davies; and that, upon the death of the said J. T. Mortimer, without issue, the said R. Mortimer, the younger, the plaintiff James Mortimer, and the defendant Ann Ford, became and were entitled to the said freehold and copyhold estates, as tenants in common in tail general, subject, as to the said freehold estates, to the said annuity; and that, upon the death of the said Richard Mortimer, the younger, without lawful issue, the plaintiff, James Mortimer, and the defendant Ann Ford became, and then were entitled, to the said freehold and copyhold estates, as tenants in common in tail general, with cross-remainders, subject as to the said freehold estates, to the said annuity. And declare, as to the leasehold and other personal estate of which the testator was possessed at his death, that the said Richard Mortimer, the younger, John Treasure Mortimer, the plaintiff James Mortimer, and the defendant Ann Ford, became, on the death of the testator, entitled thereto, absolutely, as tenants in common; and that, in the event of the said J. T. Mortimer dying under twenty-one years, and without lawful issue, his share survived to the said R. Mortimer the younger, the plaintiff, James Mortimer, and the defendant, Ann Ford, absolutely, as tenants in common, and that the plaintiff James Mortimer is now entitled, absolutely, to one third part of the said leasehold and other personal \*estate; and that the said defendant Ann Ford is now [\*285] entitled to another one-third part thereof; and that the said defendants, Martha Davies, &c., as the legal personal representatives of the said Richard Mortimer, the younger, are entitled to the remaining one-third part thereof, &c.”

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MACARTNEY *v.* GRAHAM.

1828; 7th May.—*Equity.—Lost bill of exchange.—Parties.*

A bill will lie by the last indorsee of a lost bill of exchange to recover the amount from the acceptor: and prior indorsees need not be made parties to the suit.

A BILL of exchange for 256*l.* 18*s.*, was, on the 22d of November, 1824, drawn upon the defendants, Messrs. T. & W. Graham, of Bath, by M'Laren & Denby, payable two months after date, to themselves or order. The bill

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 1828.—*Macartney v. Graham.*


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was accepted by Messrs. Graham, and made payable by them, at the banking-house of Barnard, Dimsdales & Co. in London, and was afterwards indorsed by M'Laren & Denby, and by James & William M'Laren & Co., and by William M'Laren. On the 16th of December, 1824, the bill was discounted, for William M'Laren, by one Scott, who was the agent, at Crieff, for the Commercial Bank of Scotland, and, thereupon, Scott specially indorsed the bill to the plaintiff, the manager of that bank, in Edinburgh. On the 18th of December, 1824, the bill was stolen from the mail-coach, on its way from Crieff to Edinburgh. The Commercial Bank informed the Messrs. Graham of this occurrence, and requested them to pay the amount of the bill, and, at the same time, tendered them a bond of indemnity against all future demands in respect of it.

The Messrs. Graham having refused to pay the money due on the [\*286] bill of exchange, the bill in this \*cause was filed against them only, to enforce the payment, and contained an offer, on the part of the plaintiff, to deliver to them the bond of indemnity on the amount being paid.

The defendants put in a general demurrer, for want of equity.

Mr. *Pemberton*, for the defendants, in support of the demurrer:—The equity of this case has been decided, by Sir W. Grant, M. R. in *Mossop v. Eadon*. (a) It has, however, been lately determined, in the court of king's bench, that the endorsee of a bill of exchange, who had lost it, could not recover the amount, at law, from the acceptor. (b) The ground of that decision was that the holder of the bill might bring actions against the other parties liable upon it. But, here, the bill was endorsed, specially, to the plaintiff, and no person, except the plaintiff, can make any claim upon it. Therefore, there is not, in this case, the ground which was the foundation of the decision in the case referred to.

Next, when a party comes for relief to a court of equity, he must bring, all the parties interested in the matter in dispute, before the court. All the endorsees ought, therefore, to have been parties to this bill.

Mr. *Sugden*, and Mr. *Koe*, for the plaintiff, in support of the bill:— [\*287] The case upon which Sir William Grant decided \**Mossop v. Eadon*, has been overruled by *Hansard v. Robinson*. The first indorsement on this bill was a general indorsement.

As to the objection for want of parties: against whom had the plaintiff a right to recover on this bill of exchange, except the party from whom he seeks payment. He is the person to whom the plaintiff ought to deliver the bill.

Mr. *Pemberton*, in reply:—Each of the endorsees is liable on this bill of exchange, unless it is paid by the acceptor. The plaintiff may file a similar bill against each of those individuals. Therefore, they are all interested in seeing that the bill of exchange is paid, and ought to be included in the indemnity. The bill of exchange, if it had not been lost, would, on its being paid, have been delivered to the acceptor, and each of the parties would be discharged from his

(a) 16 Ves. 430.

(b) *Hansard v. Robinson*, 7 Barn. & Cress. 90.

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1828.—*Macartney v. Graham.*

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liability: but, when the bill remains outstanding, the liability of each party remains.

The VICE-CHANCELLOR:—I do not see the force of the objection for want of parties. The acceptor is primarily liable: and he, by paying the bill, discharges the other parties from all liability.

The case of *Mossop v. Eadon*, has been overruled by the decision in *Hansard v. Robinson*.

Demurrer overruled.[1]

[1] Vide Story's Eq. Plead. 147, 148.

END OF PART II.

## CASES IN CHANCERY

BEFORE

### THE VICE-CHANCELLOR.

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[\*289]

\*BLAIN *v.* AGAR.

1828; 7th and 14th May.—*Joint stock company.—Fraud.—Parties.*

The holders of shares in a joint stock company, purchased immediately from the company, are entitled to relief, in equity, against the fraudulent conduct of the directors.

Some of the shareholders in a joint stock company may file a bill to have their deposits repaid without making all the other shareholders parties, if they are ignorant of their names.

A DEMURRER to the original bill in this cause having been allowed, (a) the bill was amended. The amendments consisted in striking out the name of one of the plaintiffs, naming three other shareholders as plaintiffs, omitting all mention of the indenture stated in the former report, and introducing an allegation that the plaintiffs were ignorant of the names of all the shareholders, except those who were parties to the suit. The plaintiffs in the amended bill, held the same number of shares as the plaintiffs in the original bill, some of which they had acquired by paying deposits to the company, and the remainder, by transfers made to them by other shareholders. The prayer of the original bill remained unaltered.

The defendants put in a general demurrer for want of equity; and also demurred, *ore tenus*, for want of parties.

[\*290] \*Mr. Sugden, in support of the demurrer:—This company is a partnership; and a bill cannot be filed, by some of the partners, to get out of a partnership, without bringing all the parties interested before the court. (b) The bill cannot be sustained, because it is not filed by the plaintiffs on behalf of themselves and others having the same interest.

The second objection is, that the remedy is at law. The plaintiffs do not require any accounts to be taken, but only that they may be repaid their deposits. There is only one case that comes near this, and that is *Colt v. Woollaston*. (c) That case involved the trust of a real estate, which gave this court jurisdiction. The bill alleges that mines have been taken and worked; and, therefore, this scheme cannot be said to be a bubble. If a person wishing to sell a public house misrepresents the custom of it, did any one ever know of a bill being filed, in this court, to be relieved against the misrepresentation?

(a) See 1 vol. 37.

(b) See *Long v. Yonge*, post.

(c) 2 P. W. 154.

1828.—Blain v. Agar.

A great many of the directors are not before the court ;(d) and the nature of the office is, not to make subsequent directors answerable for the dealings and transactions of their predecessors ; and, therefore, if the latter have acted unfairly, the former are not responsible for their conduct.

The bill states that many of the scrip receipts were \*sold and delivered over, by the persons holding the same, to other persons ; by which means the plaintiffs became placed in, and vested with the situation and rights of the sellers ; and that some of the purchasers, afterwards, made re-sales and transfers to others ; and that the plaintiffs were original applicants for shares, and paid deposits to the bankers of the company ; and that, by such means, the plaintiffs became, and are holders of 1690 shares, and entitled to all right, benefit, and interest to, of, in, and from the deposits and sums paid, as aforesaid, upon and in respect of the same shares respectively, and the holders of the scrip receipts delivered in respect of such shares respectively. This statement amounts to this : that, though the plaintiffs are original holders of shares, they are also holders of shares which they purchased from others ; and, therefore, they ought to have brought before the court the original purchasers of the shares of which they are assignees. Besides, the sale of scrip is within the bubble act.(e) The transferees of the scrip receipts could maintain no action, against the directors, to recover the money which they paid to the original holders. The directors are not stated to have any control over the funds of the company, nor have they any power to let the plaintiffs out of the concern. The plaintiffs assume to represent all the parties interested, and yet the bill is filed by themselves alone.

The bill does not pretend that the money is still in the hands of the bankers, but expressly alleges that it has been spent in prosecution of the scheme ; the \*plaintiffs, therefore, are too late to apply to have their [\*292] money returned.

The bill states that, in November, 1825, mines had been worked. This puts the plaintiffs out of court ; for it shows that the scheme was not a mere bubble.

If the relief prayed were granted, the plaintiffs would continue partners as to the public, and also as to the rest of the proprietors, for their liabilities to both would remain.

The parties are wanting, without whom the plaintiffs cannot obtain the only relief that they are entitled to, namely, to have the partnership dissolved.

Mr. Theobald, with Mr. Sugden, cited *Beaumont v. Meredith*,(f) *Farmer v. Russell*,(g) *Josephs v. Pebrer*,(h) and Mitf. Treat. 129, and said that it was

(d) Both the original and amended bills alleged that such of the directors, named in the prospectus, as were not made defendants, had never acted, or in any manner interfered with the affairs of the company.

(e) 6 G. 1, c. 18.—Sect. 18, 19, and 20 of this act were repealed by 6 Geo. 4, c. 91.

(f) 3 V. & B. 180.

(g) 1 Bos. & Pull. 296.

(h) 3 B. & C. 639.

1898.—Blain v. Agar.

impossible to read the bill without seeing that the plaintiffs treated the company as a partnership; that, if it was not a partnership, and the plaintiffs were entitled to a return of their deposits, each of them ought to have sued separately, and that it had been so decided in *Jones v. Garcia Del Rio*; (i) that, though the plaintiffs might, in respect of the shares of which they were the original holders, be entitled to have their deposits returned on account of the misconduct of the directors, yet it did not follow that they had the same right, in respect of the shares of which they were transferees: that, the plaintiffs might each have a different equity: that, by some of them, the fraud might [\*293] have been waived: that \*the association was illegal, as the shares might be transferred *in infinitum*; and that therefore the court would remain neuter between the parties.

Mr. *Knight*, in support of the bill:—This bill is not distinguishable from the former one, except by the absence of the deed, upon which the objection to that bill that prevailed was founded. In *Colt v. Woollaston*, the plaintiffs were two unconnected shareholders: therefore the form of the record is right. Any number of individuals may join together, to recover the deposits which have been obtained from them by fraud.

I deny that this is the case of a partnership. The foundation of the plaintiffs' case is this, that the defendants have cheated them out of their money, by false representations of a partnership which never has been, and never can be constituted. In such a case, one plaintiff cannot file a bill on behalf of himself and others; for *non constat* that they may all wish to withdraw their money. If there has been a trading, the act was not authorized.

Next, as to the objection that the scheme is illegal. Has there ever been a statute passed, which fixes a limit to the number of parties in a concern? There is no pretence, here, to act as a body corporate, or to raise transferrable shares. A mere right is transferred of going in and executing a deed which is afterwards to form a partnership. Is there any thing illegal in that?

*Nockells v. Crosby.* (k)

[\*294] \*All that I have to show, is that this case is within the principle of *Colt v. Woollaston* which was a case of equitable assumpsit, where relief was given against a fraud. If the plaintiffs have been cheated of their money, according to the statements of the bill, which are admitted by the demurrer, the principle of that case applies to the present one. It is stated that, before any thing near 500,000*l.* had been paid, or even subscribed for, the directors, without the privity of the plaintiffs, set to work, and began to take mines, although the plaintiffs paid their money on the faith that nothing would be done until the whole capital was raised, and the deed of settlement was executed. The plaintiffs might have advanced their money to make part of a capital of 500,000*l.*, though not to make part of a capital of 100,000*l.* The defendants, too, reserved no fewer than 3,800 of the shares, intending to make

(i) 1 Turn. &amp; Russ. 297.

(k) 3 B. &amp; C. 814.

1838.—Blain v. Agar.

profit of them; but they now refuse to take those shares. A great many of the persons named as directors, never had any thing to do with the concern.

Although the new directors may not have been parties to the fraud, yet, if a certain number of persons have cheated an individual of his money, and transferred it into the names of themselves and others, that individual has a right to sue all the transferées.

Mr. *Sugden*, in reply :—This is not a case in which the directors have put one shilling into their own pockets. The statements in the bill show that the partnership has commenced; and no one can withdraw from the partnership without performing all the obligations to which he has become \*liable. No answer has been given to the argument that these plaintiffs [\*295] do not seek to get rid of the partnership. Either the plaintiffs must apply to the court as representing themselves and others, or each must come, singly, for his own demand. If an estate is sold in lots, and it is sought to set aside the sale on the ground that there was no real bidders at the sale, every one of the purchasers must file a separate bill.

The time at which each of the plaintiffs became a partner, may give him an entirely different equity from that of the other co-plaintiffs. Each may have a different case. It is not pretended that these plaintiffs all bought their shares at the same time. *Jones v. Garcia Del Rio*. In *Colt v. Woollaston*, two persons were allowed to join as co-plaintiffs: but an answer, and not a demurrer, was put in; and therefore the objection was not taken. Besides, the two parties there stood in precisely the same situation. The estate was vested in a trustee; they, therefore, were *cestui que trusts*, and had a right to join in the bill.

The VICE-CHANCELLOR :—This bill states a case of fraud, in respect of which a court of law will relieve; and it is no reason to prevent that relief being obtained in a court of equity, because it may be had at law; for in cases of fraud, courts of equity have concurrent jurisdiction with courts of law.[1] In *Colt v. Woollaston*, the Master of the Rolls says: "It is no objection that the parties have their remedy at law, and may bring an action for moneys had and received for the plaintiffs' own use; for, in cases of fraud, the court of equity has concurrent jurisdiction with the common law: matter of fraud being the great subject of relief here." And it \*does not appear [\*296] that the judgment of the Master of the Rolls was founded upon the circumstance that the suit concerned land.

From the statements in the bill that have been referred to by the defendants' counsel, it is plain that the plaintiffs do mean to claim, as being immediate purchasers, and as purchasers from prior purchasers; and, as far as they sue

[1] This court is not ousted of any part of its original jurisdiction, because a court of law exercises the same or a similar jurisdiction. *Eyre v. Everett*, 2 Russ. 381. *Sailly v. Elmore*, 2 Paige, 497. *Fitzgerald v. Stewart*, post, 342. *Hodgson v. Murray*, post, 515.



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 1828.—Townley v. Colegate.
 

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in the latter character, it is impossible to maintain the bill :[2] but, as original purchasers, they do not stand exposed to any such objection.

This, then, being a case in which the plaintiffs are entitled to some relief in a court of equity, the demurrer for want of equity, must be overruled.

Next with respect to the objection for want of parties.[3] If there were not the allegation, in the bill, that the plaintiffs do not know the names of the other subscribers, there would be no substantial difference, as far as this objection is concerned, between the record as it now stands, and as it was originally shaped. But, as the present bill contains that additional allegation, I am of opinion that the demurrer, for want of parties, is not sustainable.(1)

[\*297]

\*TOWNLEY v. COLEGATE.

1828; 5th and 22d May.—*Pleading.—Tithe of Mills.—Evidence.—Vicar.*

Defendant, in her answer to a bill for tithes of a mill, said that it was an ancient mill, built before living memory; that no tithes had ever been paid for it; and that it had always been considered exempt from tithes. Held that the exemption was well pleaded.

A miller who grinds his own corn, and sells the flour, is not liable to tithes for his mill.

A terrier is evidence as to personal tithes.

Issue directed, on the application of a vicar, to try the right to tithes.

THE plaintiff was vicar of the parish of Orpington, with St. Mary Cray annexed, in the county of Kent. The bill alleged that the defendant, Margaret Colegate, had, ever since the plaintiff's induction, occupied a water corn mill in the parish of Orpington, at which she had ground large quantities of corn, grain and malt belonging to other persons, and had made great profit by the toll paid for the grinding of it; and that she had also ground, at her mill, other large quantities of corn, grain and malt belonging to herself, and had sold the meal so ground, and made great profit thereof. The bill contained similar allegations as to the water corn mill occupied by the other defendant, Snelling, in St. Mary Cray. It prayed for an account of the tithe of the profits made by the defendants of their respective mills.

The defendant Colegate, by her answer, said that she believed the corn mill in her occupation, was an ancient mill, and was built on the foundation or site

(1) In *The King of Spain v. Hullett*, which lately came before the Lord Chancellor, some persons who were merely agents, in this country, for the Spanish government, were joined, with the King of Spain, as plaintiffs in a bill for an account of moneys, belonging to that government, in the hands of the defendants. The defendants, demurred, generally, to the bill, on the ground that the agents, having no interest in the subject matter of the suit, ought not to have been made co-plaintiffs with the King of Spain; and the Lord Chancellor allowed the demurrer. [*Delondre v. Shaw*, ante 237, 240, and note *ibid.*]

[2] A shareholder claiming by purchase must show how he derives his title. *Walburn v. Ingilby*, 1 Myl. & K. 61.

[3] Vide *Bromley v. Smith*, 1 Sim. 8—11, and note *ibid.* *Blain v. Agar*, *id.* 44, and note *ibid.* *Long v. Yonge*, post, 369.

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of an ancient mill, and which was built and existed before or beyond living memory : that she had never paid any tithes, and that she believed no tithes had ever been paid for such mill, but that it had always been considered exempt from tithes ; she admitted that she had ground corn, grain and malt, as well belonging to herself as to other persons, and had made profit by the toll paid for grinding the former, and had sold and made profit of the meal arising from the latter ; but \*insisted that, for the reasons and under [\*298] the circumstances before stated, her mill was not liable to pay tithes ; and added that she believed that, from time whereof the memory of man was not to the contrary, it had been free from tithes.

Snelling's answer was to the same effect, except that he said that his mill was an ancient mill, and was built and existed before or beyond living memory, and denied having ground at it any malt at all, or any corn or grain belonging to any person but himself.

The only evidence produced on the part of the plaintiff was a terrier, dated in 1764, and containing the following passage : " Mills of Orpington, six and thirty shillings ; St. Mary Cray, forty shillings ; by custom yearly, to our vicar, at quarterly equal payments, due from each to be paid."

The defendants examined several old inhabitants of the parishes, who deposed that they believed the mills to have existed beyond the time of living memory ; and that they never knew or heard of any tithe having been paid for them ; and one of these witnesses said that the general reputation in Orpington was that Mrs. Colegate's mill was not liable to the payment of tithes. The defendants also produced an extract from Domesday book, in which it was stated that there were three mills in Orpington, of 16s. 4d. ; and also a grant from H. 8. of the manor of Orpington, in which mills were mentioned, generally ; and also a conveyance to the father of the defendant, Snelling, which comprised a mill in St. Mary Cray.

The first question that arose in the argument in this \*case was, [\*299] whether the exemption from tithes was well pleaded in the answers.

Mr. *Pemberton* and Mr. *Stuart*, for the plaintiff :—It is impossible to support an exemption laid as it is in this case. If a mill is stated to be an ancient mill, or to have been built on the site of an ancient mill, the court will understand it as capable of being exempt from tithes. But, if it is alleged to have been built beyond the time of living memory, the defendant then explains what he means by an ancient mill, namely, that it was built at an earlier period than any one can remember. It is consistent with the defence here made, that the mills might have been built after 9 Ed. 2, and yet have never paid tithes. The question is, do these defendants allege, with sufficient certainty, that the mills were built at such a time as to be capable of being exempt from tithes ? If they were built after that time, though they have never paid tithes down to the present hour, they are not exempt from tithes.

Mr. *Sugden* and Mr. *Barber*, for the defendants :—The answers state that these water corn mills are ancient mills, built before living memory : that no

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tithe was ever paid for them : and that they have always been considered exempt from tithes. In *Browne v. Woolley*,<sup>(a)</sup> which was decided by the court of exchequer, on the 7th February, 1826, one of the defendants alleged that the mill in his occupation had been erected for upwards of fifty years ; that it stood, as he had been informed, upon ground upon which another mill formerly stood ; that he had been informed and believed that, from the date of [\*300] the erection of the said mill down to the present \*time, no tithes had been paid, in respect thereof, or of the corn or grain ground thereat ; and he insisted that, under the circumstances, the mill ought to be presumed an ancient mill, and exempt from the payment of tithes. The allegations in the case now before the court, are stronger than they were in the case referred to, and yet the exemption was held to be well laid in the latter case.

The VICE-CHANCELLOR :—If a bill is filed to establish a modus, it must lay the modus precisely. But, if a modus is pleaded in an answer, it is sufficient to state it so that the plaintiff may know what the defence is. The defendants here first state that these mills are ancient mills, and were built before living memory ; they then allege that no tithes have ever been paid for their mills, but that they have always been considered exempt from tithes ; though it may be questionable whether the first statement is sufficient, yet the other passages remove all doubt upon the subject ; and I, therefore, think that the exemption is sufficiently laid.

Mr. *Pemberton* and Mr. *Stuart* :—The parol testimony is as weak as possible. There is but one witness who speaks as to there being a reputation, in the parish, that Mrs. Colegate's mill is exempt from tithes. But, as to the other mill, there is not a particle of evidence upon that point. If the defendants had proved, by the books of tithe-collectors, that no tithes had been paid for the mills, that would have been something ; but they have only examined persons, most of whom are paupers. On the other hand, we have pro- [\*301] duced a terrier, which affords evidence, in our \*favor, of the greatest importance. The question is, whether evidence that the witnesses never heard of tithes being paid, is sufficient ?

Mr. *Sugden*, and Mr. *Barber*, for the defendants :—Some of our witnesses worked in the mills, and they all swear that the mills existed before living memory, and appeared to be old mills in their boyhood. If it is shown that no one remembers the erection of a mill, and that it has not paid tithe, it is sufficient ; and it is not necessary to prove that it existed before 9 Ed. 2. We have proved, by the extract from Doomsday book, and the grant from Hen. 8, that there were mills in these parishes. The plaintiff has not attempted to prove that there were any other mills in the parish, or that they were not the mills mentioned in those documents. No tithe was ever demanded for these mills : this accounts for there being no reputation in the parishes as to their being exempt from tithes : for the right was not likely to be a subject of dis-

(a) See a report of this case, post 305.

1828.—*Townley v. Colegate.*

cussion. The tithe of mills is a personal tithe, and therefore the terrier is not admissible in evidence. Watson's Complete Incumbent<sup>(b)</sup> lays it down that where no personal tithes have been paid, none are due. It was decided, in *Browne v. Woolley*, that, where the occupier of a mill is a manufacturer of flour, no tithe is payable.

The other authorities cited for the defendants, were *Hughes v. Billinghurst*,<sup>(c)</sup> *Newte v. Chamberlain*,<sup>(d)</sup> \**Wilson v. Mason*,<sup>(d)</sup> Com. [\*302] Dig. Dimes, H. 12. Ibid. E. 4.<sup>(e)</sup>

Mr. Pemberton, in reply :—It has been said that tithes are not due for a mill, where the miller grinds his own corn and sells it; but tithe is payable in respect of the profits of the mill; and, if a miller grinds his own corn, and sells the flour at an advanced price, he makes a profit. *Hughes v. Billinghurst* is a mere loose note, and it only states that the bill was dismissed; not a single fact was mentioned. All that is decided by it is, that, if it is proved that a will might be an ancient one, and that no tithe had been paid for it, it affords a presumption that it was an ancient mill. It has been said that the tithe of mills is a personal tithe, and, therefore, that the terrier is not evidence; but no authority has been produced for this proposition. The tithe of mills is not a personal, but a mixed tithe. The terrier is signed by the churchwardens, who represent the parishioners, as well as by the vicar. It is, therefore, signed by all necessary parties, and contains an admission, on the part of the vicar, and of those who represent the parishioners, that certain sums were payable for those mills. Those sums are of too large amount to be moduses, supposing that there could be a modus for a mill, which there cannot be, because, before 9 Ed. 2, mills paid no tithe. The defendants have possession of every title-deed relating to this property, and might have shown from them, that these mills are ancient ones; \*and that no tithe was ever paid [\*303] for them. They cannot be the same as those mentioned in Domesday book; for, in 1634, there is evidence that tithes were paid for them. Next, we have the grant of Hen. 8, by which the manors are conveyed, "together with all mills, &c." These are nothing but general words. The interval between Domesday book and the year 1751 is not filled up. Mrs. Colegate does not produce a single deed, not even her own conveyance. Then we come to the parol testimony. Was it ever attempted before to support a case of exemption by such evidence as this? No testimony is given as to reputation, except by one of the witnesses, and even he does not say that he ever heard a syllable on the subject from persons now dead. Though, generally speaking, a party cannot be required to prove a negative, yet it might have been proved that no tithes had been paid for these mills, by the evidence of former occupiers, and by the books of the tithe collector.

(b) See page 580.

(c) 2 Gwill. 644.

(e) Vin. Ab. tit. Dimes, M. 2. and 1 Bro. P. C. 157.

(d) 3 Gwill. 974.

(e) See also *Manby v. Taylor*, 3 Ves. & Bea. 71. *Ansell v. Adman*, 3 Gwill. 982. *Carlston v. Brightwell*, 2 P. & W. 463. *Hall v. Macket*, 4 Gwill. 1460, and 1 Gwill. 130, note.

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 1826.—*Browne v. Woolsey.*


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The Vice-Chancellor, after stating the claim made by the bill, and the defence set up in the answer, continued as follows:—The first question is, whether tithes are payable in respect of corn, belonging to the parties, ground at their own mills, and afterwards sold to the public. It appears to me that the case of *Wilson v. Mason*, is an authority that, in respect of corn so circumstanced, no tithe is payable. In the late case of *Browne v. Woolsey*, the point was distinctly brought forward, and twice deliberately considered, once by the chief baron alone, and then by him and the three other barons; and my opinion is in favor of that decision, and that the law is right as laid down in that decree.

[\*304] \*Next, as there has been corn ground at the mill occupied by Mrs. Colegate, which did not belong to her, it is necessary to consider whether it is made out that that mill is an ancient one.

Terriers are received in evidence of tithes merely personal; and I therefore think that the terrier is admissible in this case. But the evidence it affords is not very material, as there is nothing to connect the mills mentioned in it, with the mills in question. The evidence which has been given by the witnesses, is very strong to show that these are ancient mills. The same persons also gave testimony of a negative kind, that they never heard that any tithe was paid for the mills; and there is no evidence that any was paid, except the terrier. Upon the whole, I am of opinion that the bill must be dismissed, with costs.

Mr. *Pemberton* asked for an issue to ascertain the liability of Mrs. Colegate's mill to pay tithes.

Mr. *Barber* said that the vicar was not entitled to an issue, as his was not a common law right.

But the Vice-Chancellor granted the issue.(f)

[\*305]

\*BROWNE v. WOOLLSEY.

In the Exchequer. 1826; 7th February.—*Tithe of Mills.*

A miller who only grinds his own corn and sells the flour, is not liable to tithes for his mill.

THE plaintiff was rector of South Town, otherwise Little Yarmouth, and West Town, thereto annexed, and vicar of Garleston, in Suffolk, which rectory and vicarage adjoin each other, and have a common parish church. The defendants were occupiers of corn mills within the rectory. The bill charged that the defendants had, during the six years prior to the filing of the bill, ground, at the mills in their respective occupations, large quantities of corn and grain, and sold the same, when so ground, in large quantities, for large

(f) See Com. Dig. Ecclesiastical Persons, C. 14, a.

1826.—*Browne v. Woolley*.

sums of money, and also done a great deal of work called bag and toll work, by which was meant the grinding the corn and grain of other persons, who remunerated the miller by paying him, either a certain sum of money for a certain quantity of the corn and grain ground at his mill, or by allowing him to retain a dish or certain portion of the corn and grain so ground; and that the defendants had also done a great deal of work called dressing of flour or meal, and had employed their mills to other purposes, and had thereby made large profits, the tithes whereof were payable to the plaintiff. The bill prayed for an account of the profits, made by the defendants, in respect of the said mills in their occupations, and that the defendants might be decreed to pay, to the plaintiff, what upon the taking of the account, should be found due to him.

The defendants, Woolley and Secker, by their answer, said that, being merchants and dealers in corn and flour, they were in the habit, from time to time, of \*buying large quantities of grain, and of grinding and [\*306] selling the same, in its manufactured state, and that they used the mill belonging to them for the purpose of grinding the corn so purchased and resold in its manufactured state, in the course of their trade; and that, except as after mentioned, they had never used their mill for any other purpose; and that, under the circumstances aforesaid, there was not, and, except as after mentioned, there never had been any profit arising from the grist or mulcture of the corn or grain at their mill, independent of the profits arising from the said trade; they admitted that their mill was a modern one, and submitted that it was exempted from tithes so long as it continued to be employed in the manner and for the purposes before mentioned: they denied that they had done any bag or toll-work at their mill, or employed it for any purpose except as before mentioned; but they admitted that they had, in a few instances, ground a few bushels of wheat, for the convenience of certain persons, in consideration of a small compensation in money, but that the whole amount of such compensation had been much less than sufficient to cover the fair annual value and pay the out-goings and expenses of their mill, and they submitted, therefore, that no tithes were due in respect thereof: they denied that they had in their possession any books, &c. which showed the quantities of corn and grain ground and worked at their mill, or the profits made by them, other than the books, &c. relating to their trade, which enabled them to ascertain the quantities of corn and grain ground and worked at their mill, but did not show the profits made by them; for that they were in the habit of buying corn and grain for the purpose only of grinding and manufacturing \*the [\*307] same into flour; and that the said books contained entries only of the quantities of corn and grain bought, and of meal and flour sold by them, and that the profits made by them in respect of their mill, were wholly intermixed with the profits arising from the manufacture of flour and from the purchase and sale of corn and flour, and could not be distinguished: they denied that they had received or retained any corn or grain for bag or toll work; and they submitted that, under the circumstances aforesaid, no tithes were due or paya-

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 1826.—*Browne v. Woolsey.*


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ble in respect of their mill ; but that, if the court should be of opinion that tithes were due in respect of the mill in their occupation, the plaintiff was entitled to no more than a tenth-part of the clear profits arising from the grinding of corn at their mill, after deducting a fair annual rent for the same, and all such other expenses and allowances, as, in the judgment of the court, the defendants were entitled to claim.

The answers of the defendants Cooper and Jenner, were to the same effect, except that the latter denied having done any bag or toll work at his mill.

The defendant Waters, by his answer, said that the mill in his occupation had been erected upwards of fifty years, and stood on ground upon which another mill formerly stood, and that no tithes had been paid in respect of the corn ground thereat : and he submitted that his mill ought to be presumed to be an ancient mill, and exempt from the payment of tithes : he denied that he had, in his possession, any books, &c. relating to his mill, or the work done thereat, or the profit made thereby, other than the books relating to [\*308] his trade, which contained only entries of the corn and \*grain bought, and of the quantities of corn, grain and flour sold by him ; but that, in consequence of the corn bought by him being, in some instances, resold by him before it was ground, and in consequence of corn of different qualities producing different quantities of flour, such entries did not show the quantities of corn and grain and other things ground and worked at his mill, or the profits made by him. In other respects the answer of the defendant was to the same effect as that of the defendant Jenner.

Mr. *Pepys* and Mr. *Simpkinson*, for the plaintiff.

Mr *Martin*, and Mr. *Turner*, for the defendants.(a)

The LORD CHIEF BARON :—In this cause the plaintiff is the rector of South Town, otherwise Little Yarmouth, and Vicar of Garlestown, in the county of Suffolk. These benefices are united, and have but one parish church. The bill is brought, against the several defendants, for an account of the tithes of mills in their several occupations. Not any of the mills are ancient. The defendant Waters says his mill, though built within fifty years, was built on the site of an old mill, and is, therefore, an ancient mill. There is nothing in the cause, that I can discover, to warrant and support this assertion, and therefore they must all be taken to be recent mills. All the defendants say that they do not grind for hire, in the usual way ; but that they are corn and grain merchants : that they buy the corn and grain, grind it, and then sell the flour in its manufactured state ; and they insist that, for this operation, no tithe is payable.

[\*309] \*There has been much controversy at various times, and there have been many cases respecting the tithes of mills, as to their nature and their character, and as to the manner in which they should be tithed. It seems now settled that they are personal tithes ; but that, in one aspect, and for one

(a) The reporter had no note of the arguments. The judgments are taken from the notes of Mr. Gurney, the short-hand writer.

1826.—*Browne v. Woolsey.*

purpose they are predial. They are personal as to the mode in which the tithe shall be computed, and as to the time at which it shall be rendered; and they are predial as to the person to whom the tithe is rendered. They belong to the incumbent of the parish where the mill is situated; so far they are predial. They are payable only at Easter, and the clear gains alone are titheable, after deducting all expenses; so far they are personal. The general question here is, whether tithes should be rendered where a mill is not, as hitherto it has usually been, by itself, a substantive undertaking, where the sole profit is derived from the act of grinding, but where it is employed as part of a trade or commerce. I am of opinion, and I speak my own sentiments only, that, under these circumstances, no tithe is to be paid in respect of the employment of this engine in the trade. It is quite clear that the incumbent is not entitled to participate, in any shape, in the profits of a trade or manufacture. That is a proposition that cannot be disputed. It is equally clear, on the other side, that, if the mill is employed in the usual way, and the miller is paid for the grist or mulcture, the incumbent is entitled to an aliquot part of what he receives, after deducting the expenses. It has appeared to me that what I have had to consider in this case, is, under which of these descriptions this case is to be classed. I think it is under the first. It appears to me to be decisive against tithes being due, that there is no \*possible medium by which [\*310] it can be ascertained how much is due, upon the common principles of tithe. The occupier buys the grain, and he sells the flour. How much profit or how much loss remains to him, upon the whole, is what he only knows. In one transaction there may be some loss, and, in the next, a great gain. On the whole there may be a profit; or there may be, upon the whole, a loss. This arises from the change in the market prices of the commodity. Suppose that upon one purchase he loses, is any tithe to be paid in that case? Suppose upon the next he derives a double profit; is double tithe is to be paid for it? When he loses, it is clear he receives nothing for grinding; when he gains, who can say how much is to be considered as received for grist? I beg that it may be always remembered that tithe, in its nature, is an aliquot part of some increase, or profit received, or part of the thing itself; and a decree for those tithes must proceed upon that ground. I must admit that an occupation rent might be set on the mill, and a proportion of that rent so set might be paid to the incumbent; but then I say that tithe is, in its nature, an aliquot part of an actual increase, or actual profit. Now, supposing that there were an occupation rent set on a mill, the party that paid that would be paying an assessment in lieu of tithe, not tithe, not an aliquot part of any increase or profit obtained for grinding. The legislature might enact such a substitution for tithes; but it would be a substitution: and no court could, in my judgment, decree it as being tithe, that is, an aliquot part of the profit actually obtained.

I am the less reluctant to adopt this reasoning, because the point appears to me to have been actually \*laid down, by great authority, in [\*311] one of the cases which has been cited, the case of *Wilson v. Ma-*



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son, (b) of which I shall only say that it appeared there, that the defendant ground his corn for the purpose of distillation, and for the purpose of feeding hogs with the refuse ; and, upon the ground which I have stated, in that case the mill was not held to be titheable ; and the principle is stated, by Lord Chief Baron Parker, in these words : “ Now the profits arising from the distillation, and feeding of hogs, are so intermixed with the grist or mulcture of the corn, that we do not see by what medium they can be separated, or how we can distinguish the quantum of the plaintiff’s satisfaction for the grist or mulcture, from the profits of the trade, which he ought to have no share of, upon his present demand of tithe of a mill.” Now that principle is, in my judgment, directly applicable to this case ; and there is too much good sense in it to leave me to doubt whether that could be questioned. There are, in this case, however, some loose phrases from which it might be inferred that, if the flour or meal had been sold, and not used, it might have been titheable ; but I think the principle I have read from the book, goes the full length of deciding that, where nothing is paid, specifically, for the grist or mulcture, nor any profit obtained but what depends entirely upon the circumstances, it becomes impossible to make the separation essential to this claim : and I cannot doubt, that, upon the same principle upon which they decided in that case, that court, if they had had

this case before them, must have felt themselves compelled, upon ex-  
[\*312] amination, to have decided in this. It is said \*that, by making use of

his mill in this way, the miller deprives the incumbent of his tithes : but so it is with every species of tithe. The occupier may use his land in such a way as to give the benefit of it to the owner of the great tithes, or the owner of the small tithes ; or, if he pleases (of which we have heard, as an anecdote, a remarkable instance) he may let his land go to waste. He is not bound to produce any tithes : that prevails in the whole nature of tithes. He may cultivate that produce which pays a small and insignificant modus, or that which is titheable : the tithe owner must take his chance as to that.

Upon the best consideration I can give this case, it appears to me impossible to divide these two things except by an act which is not tithing, but making an assessment in lieu of tithing. I, therefore, think that this bill must be dismissed as far as it seeks any account of this trade.

But three of the defendants admit that they have, from time to time, in some small quantities, upon the application of a particular person, in some few cases, ground some little matters by the bag, as they call it. That is the common case in which a mill is held to be titheable ; and, if the plaintiff deems it advisable to have an account of that, I do not see upon what principle it can be refused. He may, perhaps, admit that he has been paid for it ; however, I should hardly think it worth his pursuing ; in which case I think that the bill should be dismissed ; but, under the particular circumstances of the case, my own impression is that it should be without costs.

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\*Mr. Baron Graham :—I have to express my regret at feeling myself obliged to say that I am of a different opinion from the learned Lord Chief Baron ; and I rather apprehend, from my two learned brothers. But I own it strikes me in a different way from what it has been suggested by my Lord Chief Baron.

The circumstances of the case are extremely plain and clear. There is a mill that is liable to tithe, and must have been so from the time of its first erection, which is long since the stat. of Edward VI. ; and the circumstances which create the peculiarity of this case, on the ground of which this temporary exemption is claimed on the part of the defendants, are that, instead of grinding, at the mill, the corn of other persons, he purchases the corn himself, converts it into meal, and makes his profit, not by the grinding of the corn merely, but by the selling of the meal. Now, when I expressed my regret at being of a different opinion from my Lord Chief Baron and my learned brothers, I felt the difficulty of sustaining my opinion in opposition to theirs ; but I feel much greater difficulty from the case which has been cited by my Lord Chief Baron, and upon which, mainly, his opinion appears to be grounded ; for, unless I can point out a very clear and marked distinction between the present case and that of *Wilson v. Mason*, it would ill become me to oppose the authority of an individual judge to a case that has been solemnly decided, and decided, undoubtedly, by very able judges at that time. But the case of *Wilson v. Mason*, to my apprehension, is perfectly and essentially different from this. There the subject before the court was not a miller. I know that Lord Chief Baron Parker says that he had the character both of a miller \*and a distiller ; but he was, essentially, a distiller ; and that [\*314] seems to me to mark the difference in the first instance. Then what is the trade of a distiller ? A mill is erected for no purpose of grinding corn for the general profit of man, or for the food of man ; which are, according to my apprehension, the two objects of the grinding where the tithe is given to the parson. What are the circumstances of that case ? The defendants there had erected a mill for the purpose of grinding meal, not for the purpose of human food, but for the purpose of grinding it as one step and one advance in the progress of their manufacture ; not to use it in the shape of meal or food, but for the purpose of distillation. When this was ground, whether it was wheat or whether it was rye or barley, for the purpose of distillation, while it was in that state, it was of no use to any person, nor did they ever intend to make use of it in that state : but it was to be placed in the still, and to undergo a variety of other processes, and go through experiment after experiment ; and they were to derive their ultimate profit, not from the meal or the corn, but from the result of the manufacture. That was a complicated case in many of the circumstances ; and, to be sure, the court might say, very clearly, that such a case as that was not within the object of the statute which gives this particular tithe of mills ; because the corn ground in that mill was not used for human food, but was merely subservient to the great purpose of the manufacture, which was that of distillation ; and then the maxim applies, that you will

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 1826.—*Browne v. Woolsey.*


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not break into the private concerns of a man's trade ; you will not oblige him to discover his affairs, in order to know what would be the ultimate profit from his manufacture.

[\*315] \*But it appears to me that the case that presents itself before us, is perfectly different ; because what manufacture is there in the present instance ulterior to the grinding ? There is none. When the corn is ground, the manufacture is perfectly finished ; therefore it appears to me that it is extremely easy to separate and distinguish the profit made by the miller, by grinding, in such a case as this ; for when it is ground it is fit for sale. There is nothing ulterior to be done. There is no further use to be made of it in the way of manufacture.

There is another circumstance, in the case of *Wilson v. Mason*, that I wish to mention. It appears that part of the mash was given to the hogs kept at the distillery ; and, in some instances, corn was ground for the purpose of feeding the hogs ; but I consider that as all part of the same trade. That was the general use to which they applied the corn when it was made into mash. It is perfectly known that the feeding of hogs is part of the trade of a distiller. They apply the mash, and, occasionally grind corn for the purpose of feeding hogs. But that was not within the scope and the object of the original intention of tithing mills. Then I say that, upon the grinding, here, the whole manufacture ceases ; the whole operation is done.

Now we know that, in many parishes in England, there are great numbers of mills, the titles of which constitute the principal part of the provision of the parson of the parish. Would not then the consequence be, that every miller would convert himself immediately, into a mealman ; and how is it possible for the rector of the parish to know whether a miller grinds his own corn, or the corn of other people. See then how exceedingly easy it would be to avoid the payment of tithes on those mills. In no instance, it is probable, would those mills continue to be titheable ; because it would be perfectly easy for the miller to say, to the great growers of corn : " Do not sell all your corn at market. I will buy your corn." And to the buyers he would say : " Buy your meal of me ; I can sell you meal cheaper than any body else ; because, by being a mealman, I pay no tithes at all ; and, consequently, exact a less price for my meal. By being a mealman, I can, in the improved state of my manufacture, which is meal-grinding, use the tenth part, which, if I was not a mealman, the vicar or the rector would be entitled to. I sell the tenths of the grinding, with the commodity itself, and, by that means, absorb the whole of the rector's tithe, and turn it to my whole advantage and profit."

But it is said that there is a difficulty, in this case, in separating the accounts. I will not take up the words of the learned judges who gave their opinion in the case of *Wilson v. Mason* ; but, if one were to look at their language, it would appear that they speak of the difficulty of distinguishing the clear profit of the mill from the ultimate profit which is made, by the different processes of the manufacture, in the case of a distillery. But I say I will not dwell upon that ;

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 1836.—*Browne v. Woolsey.*


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but I cannot conceive the existence of any great difficulty in coming at the clear profit the man makes, by the mill, upon the present occasion. It is said that there is a difficulty in ascertaining what are the profits he ultimately gets by converting it into meal. In the first place, if he finds it is to his advantage to convert it into meal, it \*is only saleable in the shape of meal. [\*317] No miller sells his corn as such ; but he sells it in the shape of meal.

I do not perceive that there is any kind of difficulty in ascertaining the amount. The vicar has only to ask the miller, how many quarters of wheat he has ground at such a particular time. Then, when that question is answered, he may ask him, what is the price of grinding. Though the miller pays no price, and grinds for himself, yet he knows perfectly well what the price is. If he will not say what the price is, the vicar may prove what it amounts to. Then, if there is such a quantity of corn ground, and it is ascertained what the price of grinding is, that it is for which the vicar is entitled to demand tithe. But it is said that, very likely, when he has ground that flour, he cannot tell whether he has or has not made a profit of his flour. If that were the case, I see no reason why he should not say : "with respect to what profit I make of it in the course of my trade, you have no right to ask me." Let him make that objection, when he pleases, with respect to his own discovery ; but surely it is perfectly competent for the vicar, in such a case as that, when he has once fixed what the price of the grinding is, to go on to say : "I know that, during such a time, or during so many months, you sold your meal at a profit ; you sold without complaint, and you sold in circumstances of credit ; you made, therefore, a general profit of it ; and I fix the particular profit that I am entitled to, arising from the grinding."

Upon these grounds, therefore, I cannot help thinking that this is a case of very considerable importance in itself, and of very extensive consequences ; and a case upon which I conceive myself to be perfectly grounded

\*in saying that there is not that kind of difficulty that there is in an [\*318] ulterior state of manufacture. The mere conversion of the corn into meal, constitutes all that is done ; and it appears to me that the accidental circumstance of the person uniting the two characters together of miller and mealman, does not exempt him from the payment of the tithe upon the grinding of corn. It is quite clear that the tithe cannot be separated, at the time of the grinding, from the general expense of the mill. It is quite clear that the operation of the mill, that is the grinding, being in this particular parish, the rector or vicar, at this instant, would be entitled to the tithes upon it, if there was not this difficulty opposed to him, as to the impossibility of separating the account of that which he is entitled to. That does not appear to me to be such as supports my learned brother's judgment. Upon these grounds, therefore, I am of opinion that the bill ought to be sustained, to the extent of this claim, against the persons who are, at the same time, mealmen and millers.

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 1828 —Footner v. Figs.
 

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Mr. Baron Garrow, and M. Baron Hullock, concurred, in opinion, with the Lord Chief Baron.(c)

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[\*319]

\*FOOTNER v. FIGES.

1828; 10th May.—*New trial.—Construction of 47th order.*

A motion for a new trial must be made before the same jurisdiction as directed the former trial, although the judge may have resigned.

Mr. BICKERSTETH, on moving for a new trial of an issue directed in this cause, referred to the 47th of the new orders, which directs every application for a new trial to be made to the judge who directed the issue; and said that the trial, in this case, had been directed, by the Master of the Rolls, when Vice-Chancellor, and that the question was, whether the present motion ought not to be made before that judge.

But the Vice-Chancellor said that the meaning of the order was that the motion should be made before the same jurisdiction, though the judge might have been removed.

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DALZELL v. WELCH.

1828; 14th May.—*Will.—Construction.—Power.*

A testator in designating the objects of a power of appointment given to his daughter, used the words "issue," and "child or children," synonymously. In a subsequent part of his will, he gave his son a power of appointment over a different part of his property, and, in pointing out the objects of it, used the words "issue," simply: the son had both children and grandchildren living at his death: held that an exercise of the power in favor of the former only, was void.

GIBSON DALZELL, Esquire, by his will, dated the 3d of March, 1755, gave his shares in certain insurance and mining companies, and the residue of a lease, to trustees, upon trust to pay the dividends, interest and profits thereof, to his daughter, Frances Dalzell, during her life, for her separate use; [\*320] and directed, in case she should leave any issue living at \*her death, that the said shares and the produce of the said lease should be disposed of, and the produce thereof paid and applied to and amongst such child or children, at such time or times, and in such shares and proportions as Frances Dalzell should appoint, and, in default of appointment, to and amongst such issue, if more than one, in equal shares and proportions, as tenants in common; and, if there should be but one child, the whole to be paid to such

(c) An appeal from the decision in this case, has been argued, in the house of lords, during the present session; but judgment has not yet been given. 24th May, 1830.

1828.—*Dalzell v. Welch.*

one ; and, in case there should be no issue of Frances Dalzell living at the time of her death, or if they should all die before attaining their respective ages of twenty-one years, he directed that the shares, and so much of the term in the lease as should be then unexpired, should be sold, and the money arising by such sale be paid to her, or to such persons as she should appoint ; but, in case Frances Dalzell should die intestate, and without issue of her body living at the time of her death, then that his trustees should stand possessed of the shares and the residue of the term, in trust for his, the testator's, son, Robert Dalzell, until he should attain the age of twenty-one years, and that the dividends and profits thereof should, from and after the decease of Frances Dalzell without issue and intestate as aforesaid, be applied for his use and benefit till he should attain his age of twenty-one years ; and, if he should attain his age of twenty-one years, then that the shares and the residue of the term should be assigned and transferred to Robert Dalzell, or as he should direct ; but, in case Robert Dalzell should die before he should attain twenty-one years, without issue of his body living at his death, and intestate, then that the shares and lease should be equally divided amongst his trustees, their respective executors and administrators. \*And the testator [\*321] gave, devised and bequeathed all his plantations, and all other his estates, both real and personal, of what nature or kind soever, in the island of Jamaica, to certain trustees, their heirs, executors, administrators and assigns, in trust to pay the rents, profits, interest and produce of one moiety thereof to Frances Dalzell, during her life, for her separate use ; and, after her death, he directed the trustees to convey and assign the said moiety to and amongst the issue of her body, at such time or times, and in such shares or proportions as she should, by her will, appoint ; and, in default of such appointment, then to and amongst the issue of her body living at her death, their respective heirs, executors and administrators, in equal shares, as tenants in common ; and, in case Frances Dalzell should die without leaving issue of her body, he directed his trustees to pay and apply the said moiety of the rents, profits, interest and produce of his said real and personal estates in Jamaica, to and for the use and benefit of his son Robert Dalzell, during his life ; and, after his death, he directed the trustees to convey and assign the said moiety to and amongst the issue of the body of Robert Dalzell, at such time or times, and in such shares or proportions as he should, by his will, appoint ; and, in default of such appointment, then to and amongst the issue of the body of Robert Dalzell living at the time of his death, their respective heirs, executors, administrators and assigns, in equal shares and proportions, as tenants in common. And the testator directed his trustees to pay and apply, the rents, profits, interest and produce of the other moiety of his real and personal estates in Jamaica, for the use and benefit of Robert Dalzell, during his life ; and, after his decease, to convey and \*assign the said moiety to and amongst the issue of [\*322] his body, at such times, and in such shares and proportions as Robert Dalzell, should, by his will, appoint ; and in default of such appointment, then

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to convey and assign, the said moiety, to and amongst the issue of the body of Robert Dalzell living at the time of his death, their respective heirs, executors, administrators and assigns, in equal shares and proportions as tenants in common : but, in case Robert Dalzell should die, in the life-time of his daughter Frances Dalzell, without issue of his body living at the time of his death, then he directed his trustees to pay, the said moiety of the rents, profits, interest and produce of his said real and personal estates in Jamaica, to his daughter, Frances Dalzell, during her life, for her separate use, and, after her death, to convey and assign, the said moiety, to and amongst the issue of her body living at the time of her death, their heirs, executors, administrators and assigns, at such times, and in such shares, as she should, by her will, appoint ; and, in default of such appointment, then to and amongst the issue of her body living at her death, their respective heirs, executors, administrators and assigns, in equal shares, as tenants in common ; and, in case both his son and daughter should die without issue of their, or one of their bodies living at the time of their, or any one of their deaths, then he gave, devised and bequeathed his said real and personal estates, in Jamaica, to his trustees, their several heirs, executors, administrators and assigns, as tenants in common.

In June, 1756, the testator died. In 1801, Robert Dalzell's moiety of the testator's real estates, in Jamaica, was sold under an act of the assembly [\*233] of that island, and the proceeds were invested in the purchase, in the names of trustees, of 4,979*l.* 10*s.* 5*d.* 3 per cent. reduced annuities.

Robert Dalzell made his will, dated the 28th of September, 1816 ; and, thereby, in exercise of the power given to him by the will of Gibson Dalzell, appointed that the net proceeds, arising from the sale of the moiety of the plantation and premises, so sold as aforesaid, and invested in the said bank annuities, should be transferred to, and divided amongst his three children ; and he gave and bequeathed the same in the shares and proportions following ; namely, he appointed 50*l.* stock, part thereof, to be transferred unto his son, the plaintiff, John Thomas Robert Dalzell, his executors, administrators and assigns ; and declared that his reason for giving so small a portion to the said plaintiff, was because he was already amply provided for. And the testator, in like manner, appointed 50*l.* stock to be transferred to his daughter, the defendant, Henrietta Teresa Carolina Jackson. And, as to the residue of the said reduced bank annuities, he directed the same to be transferred unto his daughter, the defendant, Juliana Ann Mascall, her executors, administrators and assigns. And, as to all the rest, residue and remainder of his estate and effects, both real and personal, whatsoever and wheresoever, he gave, devised and bequeathed the same unto and to the use of his said daughter, the defendant, Juliana Ann Mascall, her executors, administrators and assigns for ever.

The testator, Robert Dalzell, died on the 16th of June, 1821. At [\*324] the time of his death, he had issue, \*the children named in his will,

1828.—*Dalzell v. Welch*.

and several grandchildren and great grandchildren; and one of those grandchildren was born at the date of his will.

The bill was filed, by John Thomas Robert Dalzell and his two sons, against the other descendants of Robert Dalzell, and the trustee of the 4,979l. 10s. 5d. reduced annuities. It alleged that, according to the true construction of Gibson Dalzell's will, all the issue of Robert Dalzell, as well grandchildren and great grandchildren, as children, were entitled to have part of the funds transferred to them, after the decease of Robert Dalzell; and that Robert Dalzell ought to have appointed some part of the fund to each of them; and that the appointment he had made was wholly void. The bill prayed that, in case the court should be of opinion that Gibson Dalzell meant, by issue of the body of Robert Dalzell, the remote as well as proximate issue of R. Dalzell, living at the time of his executing his power, or of his death, then that it might be declared that the execution, by Robert Dalzell, of his power, was void, as being in favor of some only of the objects of it.

Mr. *Sugden* and Mr. *Roteler*, for the plaintiffs:—The question is, what is the extent of the power given to Robert Dalzell by the will of Gibson Dalzell. This is not a case in which the word "issue," is used, in different senses, in the disposition of the Jamaica property; but, in every instance, it is used in the general and unlimited sense. The rule for giving the largest construction to that word, as to real estate, is stronger than in the case of personal estate.

*Davenport v. Hanbury*.(a) \*There is another case in the same book, [\*325] which is also an important authority. *Freeman v. Pursley*.(b) That case relates both to real and personal estate. The only cases in which the word "issue" has been construed in a restricted sense, are where it appears that the testator intended to use it in that sense, or where there was no limit to the issue who were to be the objects of his bounty. But here, only the issue living at the death of Robert Dalzell are to take. It was decided, in *Routledge v. Dorril*,(c) that, if a power is given to appoint to objects who are beyond the line of perpetuity, the donee may appoint to those who are within the line. The construction that we are contending for, is confirmed by the gift over. For, by that gift, the trustees are to take, if both the son and the daughter die, without issue of their bodies living at their deaths. Now the testator could not mean that, if at the death of the survivor of his son and daughter, either of them had a grandchild, though not a child living, the trustees were to take. We therefore submit that the word "issue" means all the descendants of Robert Dalzell living at his death. *Wyth v. Blackman*,(d) *Gale v. Bennett*.(e)

Mr. *Tennant* for the defendants, Mr. and Mrs. Jackson, who were in the same interest as the plaintiffs.

Mr. *Bickersteth* and Mr. *Broderick* for the representatives of Mrs. Mascal.

(a) 3 Ves. 257.

(b) 3 Ves. 421.

(c) 2 Ves. 357.

(d) 1 Ves. 196. S. C. Amb. 555; and see 3 Ves. 257, where this case is stated by M. R. from Reg. Lib.

(e) Amb. 681.



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[\*326] It is clear that the word "issue" may be construed "to mean either descendants or children, according to the meaning affixed to it by the testator himself; and the court is bound to look at every part of the will to see what meaning the testator has himself ascribed to the word. The testator, in declaring the trusts of the property disposed of, in the first part of his will, uses the words "issue" and "child or children" synonymously and interchangeably. It must, therefore, be intended that, when he used the word "issue," in other parts of his will, he meant it to be taken in the same sense. *Sibley v. Perry*.(f)

The VICE-CHANCELLOR :—In that part of the will which relates to the Jamaica estates, the word "issue" must, I think, be taken to be used in its general sense. And it seems to me that, in the first part of the will, it must be taken in the same sense, and that the words "child or children," must be considered as synonymous with "issue." For the testator could not intend that, if his daughter, Frances Dalzell, left a grandchild and no child, the property should go over to his son; or that, in case of a similar event as to the son, the property should go to the trustees.

But supposing that the word "issue," in the former part of the will, is to be narrowed so as to mean "child or children," it is singular that the testator has not used a similar phraseology in the latter part of his will. It must, therefore, be intended, that the word "issue," in the latter part of the will, was used in the sense it generally bears.[1]

(f) 7 Ves. 522.

[1] Whenever in a deed or will the intention appears to be, that the word *issue* was not intended to mean descendants but children, the courts will give it such a construction. *Hampson v. Brandwood*, 1 Mad. 388. *Sibley v. Perry*, 7 Ves. 522, 531. 1 Edw. 356, note. So, by marriage articles, a reversionary interest in a fund was agreed to be settled on the husband for life, remainder to the wife for life, and after the death of the survivor, on the *issue* of the marriage living at the death of the survivor, in equal shares if more than one, and if but one, then the whole was to go to such only child, it was held that the last expression was demonstrative that the word "issue" meant "children." *Swift v. Swift*, 8 Sim. 168. On the other hand, the word "children" is not to be extended to grandchildren, unless the intent is apparent, or the will would otherwise be inoperative. *Marsh v. Hague*, 1 Edw. 174. "It appears," says Sir William Grant, M. R. "by the cases that where there are, or may be at the time when the distribution is to take place, persons answering the description, the court is not at liberty to include any not within the terms. Thus it being clear upon the will, the *sons* is thrown on those who desire to extend the construction." *Shelley v. Bryer*, Jac. 207. Where there was a devise to A. for life, remainder to such child or children as A. should leave at the time of her decease, and to their respective heirs, &c. A. left children, and a grandchild, the daughter of a deceased son; it was held that the grandchild was not entitled. V. C. McCoun says: "Grandchildren and great grandchildren will sometimes take under the general description of children, although ordinarily the word 'children' does not comprehend grandchildren. It is either from necessity, where the will would otherwise remain inoperative, or where a testator has already shown, by the use of other words, a non-intention to restrict the term, that grandchildren are permitted to come in under a devise or gift to 'children.' Thus in *Wylde's case*, 6 Coke's R. 16, in the absence of children to take by purchase under the devise to a man and his children, the term was construed to mean *issue*, and was converted into a word of limitation—such a construction being necessary in order to give effect to the will which would otherwise have remained inoperative. And in *Wyth v. Blackman*, 1 Ves. Sen. 196. S. C.

1828.—*Maples v. Brown.*

\*MAPLES V. BROWN.

[\*327]

1828; 5th June.—*Appointment.*

Testator gave 3,000*l.* to trustees, for C. S. for life; remainder to such persons as she should appoint.

C. S. by her will, disposed of all her personal estate, and then gave all sums, messuages, &c. and other interest to which she was entitled under the testator's will. Held that the latter gift was good execution of the power.

PETER SERS, by his will, dated the 6th of April, 1811, directed that 3,000*l.* should be raised and received, by W. Maples and J. Brown, at the expiration of three years from his death, and be, from thenceforth, held by them in trust to invest the same in government or real securities in their names, and to pay the interest and dividends thereof to his daughter, Charlotte Sers, during her life, for her separate use, and, after her decease, to assign and transfer the capital to such persons and in such shares as she, whether covert or sole, by her will, or any writing purporting to be her will, should give or dispose of the same, and for want of such gift or disposition, unto her next of kin. On the 30th of November, 1811, the testator died.

Charlotte Sers, by her will, dated the 5th of June, 1818, after bequeathing some pecuniary legacies, gave all the rest, residue and remainder of her moneys, securities for money, goods, chattels, personal estate and effects whatsoever and wheresoever, unto her executors, upon trust to convert such part thereof as should not consist of money, into money, and to collect and receive all money owing to her at her death, and to invest the same in the usual securities; and subject to certain annuities, she gave the said trust moneys, stocks, funds and securities, unto the children of her sister Elizabeth

Ambl. 555, (called *Wythe v. Thurston*.) it was held that the indiscriminate use of the words 'children' and 'issue' showed an intention not to confine the former term to its proper and ordinary meaning, but to enlarge it to the same sense as the word 'issue,' comprehending grandchildren as entitled to take, not by the mere description of children, but under the more comprehensive term 'issue,' the use of which is sufficient to carry a devise or bequest to all the descendants. But it is equally well settled that where the word 'children' alone is used, and there are persons who answer the description, grandchildren or other descendants cannot take. This is a necessary result, because the term 'children' does not, according to its proper signification, extend further than to immediate descendants, and the person claiming to be legatee or devisee must accurately answer the description given in the will." *Tier v. Pennell*, 1 Edw. 354, where the cases of *Drayton v. Drayton*, and *Devereaux v. Barnwell*, 1 Desau. 324, 397, are criticised. A bequest was to A. for life and her five daughters after her death, and the survivors and survivor in equal shares, and A. left five sons and only one daughter, it was held that the daughter was entitled to the whole. *Lord Selsey v. Lord Lake*, 1 Beav. 146. A bequest to the testator's "first cousins or cousins german" does not include the descendants of first cousins; and the terms "first cousins" and "cousins german," were intended to be used in the same sense. *Sanderson v. Bayley*, 4 Myl. & Cr. 56, and see *Silcox v. Bell*, 1 Sim. & Stu. 301. A bequest to nephews and nieces does not include great nephews and great nieces. *Shelley v. Bryer*, ubi sup. See further as to the meaning of the word "issue," and when a word of limitation or of purchase, the recently published case of *Kingsland v. Rapelye*, 3 Edw. 1.

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 1828.—*Dunn v. Dunn.*


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Brown. The testatrix then proceeded as follows :—" I also give, devise and bequeath, unto all and every the aforesaid child and children of my said [\*328] sister Elizabeth Brown, all contingent or other sum and \*sums of money whatsoever, and also all messuages, lands, tenements and hereditaments, and parts and shares of messuages, lands, tenements and hereditaments, reversions, remainders, expectancies, and other interest to which I am, or shall or may hereafter become entitled unto, under and by virtue of the provisions and directions contained in the last will and testament of my late father Peter Sers, Esq., deceased ; to hold all and singular the said last mentioned, contingent personal and real property, and premises, of every description, unto the said child and children, his and their heirs, executors and administrators, for such and the like interest and estates, and in such manner as the aforesaid trust moneys are bequeathed to him, her and them."

In the course of the cause a petition was presented, by the children of Mrs. Brown, praying that it might be declared that the disposition, made by Charlotte Sers, of all her interest under the will of her father, was a valid appointment thereof, in favor of the petitioners.

That petition now came on to be heard.

Mr. *Horne* and Mr. *Collinson* for the petitioners.

Mr. *Parker* for Mr. and Mrs. Brown.

Mr. *Girdlestone* for the next of kin of Charlotte Sers :—The question is, whether this lady has given that over which she had a power, or only what she had an interest in. It is clear, from the words used, that she has disposed of that only in which she had an interest. She has a life interest [\*329] only in the 3,000*l.* under her \*father's will, with a power to appoint the capital ; and I submit that she has not executed that power, but merely given what she had an interest in.

The VICE-CHANCELLOR :—The testatrix, in the former part of her will, disposes of all her personal estate ; therefore, the words at the latter end cannot refer to what was her own, as they would be superfluous. It is, therefore, on the view of the latter words, as contrasted with the former ones, that I hold the will to be an execution of the power.[1]

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#### DUNN v. DUNN.

1828 ; 11th June.—*Multifariousness.*

The infant heir and only son of an intestate, joined with his sisters in a bill, against their mother, the administratrix, for an account of the intestate's real and personal estates. Demurrer for multifariousness allowed.

JOHN DUNN, by his will, gave all his real and personal estate to his son, John William Dunn, and appointed J. W. Dunn, his sole executor. The testator

[1] Vide *Napier v. Napier*, 1 Sim. 28, 37, and note, *ibid.*

1828.—Dunn v. Dunn.

died in April, 1827; and his will was proved by J. W. Dunn. In December, 1827, John William Dunn died intestate, leaving a son and three daughters, all infants, who were the plaintiffs in the cause, and a widow, Frances Dunn, who was the defendant. The intestate died seised of some real estates, besides those devised to him by his father. Frances Dunn took out letters of administration to her late husband, and also to John Dunn, and entered into the possession of the real estates, as the natural guardian of her son. The bill prayed for accounts of the real and personal estates, both of the testator and the intestate, and for a guardian and maintenance.

The defendant demurred to the bill, because it sought discovery and relief respecting the personal estate of the testator, and also respecting the real and personal \*estates of the intestate, which matters had no dependence on, or connection with, each other; and because it sought discovery and relief respecting the real and personal estates of the intestate, in the former of which the plaintiff John Dunn, was alone interested, but, in the latter, all the plaintiffs were jointly interested.

Mr. Sugden, Mr. Wakefield, and Mr. Dunn, in support of the demurrer, said that, if the heir were to die, there would be no person on the record to represent the interest which he had at the time of filing the bill; and they cited *Maud v. Acklom*, (d) and *Harrison v. Hogg*, (b)

Mr. Bickersteth and Mr. Teed, in support of the bill:—If the plaintiffs have all a common interest, the bill is not multifarious, because there is another subject of the suit in which they are not all interested. (c) If the son had been the only child, the same objection might have been made to the bill; for, if he were to die, the real estate would go to one person, and the personal estate to another; but, as the family is now constituted, his sisters would be his co-heirs, and would be entitled to prosecute the suit. *Salvidge v. Hyde*, (d) and *Knye v. Moore*, (e)

\*The VICE-CHANCELLOR:—The case of *Knye v. Moore* is distinguishable from the present one; for, in that case, the provision was made for the mother, she undertaking to maintain the children; and, therefore, the children had a joint interest with the mother. Here the interests in the real and in the personal estate are distinct from each other.

Demurrer allowed. [1]

(a) Decided by Sir John Leach, V. C. on the 26th of April, 1820. See a note of this case post. 331.

(b) 2 Ves. J. 323.

(c) See *Turner v. Robinson*, 1 Sim. & Stu. 313 and 6 Madd 94. Upon this case being cited in the argument of a demurrer for multifariousness, in *Marcos v. Pebrer*, before the Vice-Chancellor, on the 8th of May, 1830, [reported 3 Sim. 466.] His honor said, that he could not coincide with the decision in the case cited; as he could not see how a person being interested in the personal estates of two testators, could, consistently with the rules of the court, unite the two estates in the same suit.

(d) 5 Madd. 138; but see *Jacob's Rep.* 151.

(e) 1 Sim. & Stu. 61.

[1] In *Campbell v. Mackay*, 1 Myl. & Cr. 603, affirming S. C. 7 Sim. 564. Lord Cottenham observes; "To lay down any rule applicable universally, or to say what constitutes multifariousness

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 1820.—Maud v. Acklom.
 

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JOHN MAUD and MARY his wife, HANNAH STOKER, widow, and SARAH PICKWELL, widow, v. GEORGE ACKLOM. (a)

1820; 26th April.—*Multifariousness*.

A. B. and C. being the next of kin, and B. and C. the co-heirs of an intestate, file a bill against D. for an account of the real and personal estates of the intestate. The bill is multifarious.

ELIZABETH HARRISON, being seised of realty, and possessed of personalty, died on the 26th of November, 1818, intestate, leaving the female plaintiffs her next of kin, and the plaintiffs Hannah Stoker and Mary Maud, her co-heirs. The defendant George Acklom took out letters of administration to the intestate, alleging that he was her next of kin, possessed himself of the personalty, and paid the debts of the intestate, and applied the residue to his own use. He also possessed himself of the title deeds, and entered into the possession of the realty.

The bill alleged that the female plaintiffs were the next of kin, and that the plaintiffs Mary Maud and Hannah Stoker were the co-heirs of the intestate, and that the defendant was not related to her: that the intestate \*had books, &c. containing entries of pedigree, which the defendant had possessed himself of: and that, at the intestate's death, the legal estate was outstanding in trustees or mortgagees; and that the defendant threatened to set up that estate if the plaintiffs should bring an action of ejectment against him. The bill prayed for an account of the personal estate, and that it might be duly

(a) Mr. Dunn kindly furnished the editor with the above note of this case.

as an abstract proposition, is upon the authorities utterly impossible. The cases upon the subject are extremely various; and the court in deciding them, seems to have considered what was convenient in particular circumstances, rather than to have attempted to lay down any absolute rule." "The only way of reconciling the authorities upon the subject is, by adverting to the fact that although the books speak generally of demurrers for multifariousness, yet in truth, such demurrers may be divided into two distinct kinds. Frequently the objection raised, though termed multifariousness, is in fact more properly, mis-joinder; that is to say, the cases or claims united in the bill, are of so different a character, that the court will not permit them to be litigated in one record. It may be that the plaintiffs and defendants, are parties to the whole of the transactions which form the subject of the suit, and, nevertheless, those transactions may be so dissimilar, that the court will not allow them to be joined together, but will require distinct records. But what is more familiarly understood by the term multifariousness, as applied to a bill, is where a party is able to say he is brought as a defendant upon a record, with a large portion of which, and of the case made by which he has no connection whatever." In another case the same chancellor says: "The object of the rule against multifariousness, is to protect a defendant from unnecessary expense; but it would be a great perversion of the rule, if it were to impose upon the plaintiffs, and all the other defendants, the expenses of two suits instead of one." *The Attorney General v. Cradock*, 3 Myl. & Cr. 85. See the following additional authorities in relation to multifariousness: *Salvidge v. Hyde*, Jac. 151, reversing S. C. 5 Madd. 138. *Mole v. Smith*, Jac. 490. *Dew v. Clarke*, 1 Sim. & Stu. 108. *Shackell v. Macaulay*, 2 Sim. & Stu. 79. *Bolton v. Corporation of Liverpool*, 3 Sim. 467. *Lewis v. Edmund*, 6 Sim. 251. *Attorney General v. Merchant Tailors' Company*, 1 Myl. & K. 189. *Attorney General v. St. John's College*, 7 Sim. 241. *Pearse v. Hewitt*, id. 471. *Brophy v. Jamieson*, 2 Moll. 404.

1828.—Fitzgerald v. Stewart.

administered, and the clear residue thereof be ascertained and equally divided between the plaintiffs H. Stoker, Sarah Pickwell, and Maud and his wife ; and that an account might be taken of the rents of the real estates ; and that the defendant might be decreed to pay to the plaintiffs, Maud and wife and H. Stoker, what, upon taking such account, should appear to be due from him ; and might be decreed to deliver up to them the possession of all the real estates, together with the title deeds ; and that he might be restrained from setting up any outstanding legal estate as a defence to any action of ejectment which might be brought by the plaintiffs to recover the possession of those estates.

The defendant demurred to the bill, because, by the plaintiffs' own showing, they were jointly interested only in the personal estate of the intestate, and the plaintiffs Maud and wife and H. Stoker only, were interested in her real estates, and the plaintiff, Sarah Pickwell, had no interest in such real estates . and, therefore, such several matters ought not to be joined in one bill.

Mr. *Bell* and Mr. *Parker* in support of the demurrer.

Mr. *Agar* and Mr. *Duckworth* in support of the bill.

The Vice-Chancellor(a) allowed the demurrer.

## \*FITZGERALD V. STEWART.

[\*333]

1828 ; 11th and 12th June.—*Equity.—Appropriation.—Consignees.*

A receiver of an estate in Jamaica, appointed by the court of chancery there, in a suit, by a second incumbrancer, to have the proceeds of the estates applied in satisfaction of the incumbrances, was ordered, out of the first proceeds, to pay to A. the first incumbrancer, in London, the interest on her charge, and to consign the produce to B. the plaintiff, a merchant in England, for sale. The receiver, on making the first consignment, sent the bill of lading to A., with directions to deliver it to B., on payment of her interest. The consignments were afterwards made, by B.'s direction, to other merchants, who, for several years, continued to pay A. her interest ; but afterwards ceased to do so. Upon which she filed a bill in this country, against them, the receiver and the owners of the estate, for an account of the consignments and payment of her interest, charging collusion between the consignees and the receiver.

Demurrer, by the consignees, for want of equity, overruled.

THE plaintiff was entitled to an annuity of 325*l.* payable out of certain estates in Jamaica, and to the sum of 17,600*l.* currency, charged thereon with interest at six per cent. ; and, subject thereto, George Reid was entitled to 15,321*l.* 10*s.* 7*d.* sterling, and interest, also charged upon the same estates, which, subject to these incumbrances, were the absolute property of Edward Dalling Fitzgerald. In 1814, the annuity and the interest on the two other sums had become greatly in arrear ; upon which Reid filed a bill, in the court of chancery in Jamaica, against the plaintiff and Edward Dalling Fitzgerald, for the purpose of having the produce of the estates applied in satisfaction of the incumbrances. In pursuance of an order made, in that suit, in May, 1815,

(a) Sir J. Leach.

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1828.—Fitzgerald v. Stewart.

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Edward Dalling Fitzgerald was appointed receiver of the estates, and was ordered to pay, to the plaintiff, in London, the annuity and interest due to her, out of the first proceeds of the estates, and to ship and consign all the sugar then made or to be made thereon to Reid, for sale.

[\*334] \*In 1815, E. D. Fitzgerald died, having devised his estates to his sons, the defendants Edward Fitzgerald and Thomas Fitzgerald, and appointed the defendant Wentworth Bayly and one Cozens his executors; who, in 1816, were appointed receivers of the estates, in his place, and were ordered to conform to the directions contained in the order before mentioned. In May, 1816, Bayly and Cozens wrote a letter to the plaintiff, and enclosed in it a bill of lading of 160 hogsheads of sugar, on which was an endorsement addressed to the captain of the ship by which the sugar was sent, directing him, in case Reid & Co. should give satisfactory security to the plaintiff, agreeably to the order of the court of chancery in Jamaica, to pay to her the amount of her annuity and interest, to deliver the sugar to them, otherwise to the order of the plaintiff. The letter, in which the bill of lading was sent, was as follows: "Jamaica, May 3d, 1816.—Madam, The master not having as yet made his report on the arrears of your annuity, we have acted on the order, issued on the 9th of May last year, directing your son, as receiver of the estate, to pay your growing annuity out of the proceeds of the property and the interest of 17,600*l.* currency, for which we have now enclosed endorsed, a bill of lading on 160 hogsheads of sugar, and which, on compliance of the holders of the mortgage, whoever they may be, you will please to deliver up to them. This will be, when received, one year's payment to the 9th May, inst.—We have the honor to be, &c."

Afterwards, the receiver, by the order of Reid & Co. consigned the [\*335] produce of the estates to Milligan & Co. \*West India merchants in London; and they, out of the produce so consigned to them, by the orders of Reid, and, in pursuance of the orders under which the receivers were appointed, paid to the plaintiff her annuity and interest. Before the year 1818 Cozens died; and, on the 27th of January in that year, the defendant Bayly was appointed sole receiver of the estates, and was directed to pay, to the plaintiff, her annuity and interest pursuant to the order of May, 1815. Bayly continued to consign the produce to Milligan & Co.; and they continued to pay to the plaintiff, thereout, her annuity and interest until 1819. In and after that year down to 1821, Bayly, at Reid's request, consigned the produce to the defendants Stewart and Westmorland, merchants and co-partners; and they, by Reid's directions, and in pursuance of the order under which the receivers were appointed, paid, to the plaintiff, her annuity and interest out of the produce so consigned to them. In May, 1821, one Crossley was appointed joint-receiver with Bayly, and they were ordered to conform to the orders made on former receivers. Bayly and Crossley continued to make the consignments to Stewart and Westmorland; and they, by Reid's desire, and in pursuance of the order by which the last named receivers were ap-

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pointed, continued to make the payments to the plaintiff. In 1822, Crossley being dead, Bayly was, on the petition of Reid, removed from being receiver, and one Stevenson was appointed in his place. The order by which that appointment was made, directed Stevenson to conform to the order of May, 1815, in so far as it directed the receiver to pay, to the plaintiff, her annuity and interest out of the first proceeds of the estates that should come to his hands, and to ship and consign, the sugar made on the estates, \*to the [\*336] defendant Stewart. Stevenson accordingly consigned the sugar to Stewart and Westmorland; and they, by his desire, and in compliance with the orders of the court, continued to pay to the plaintiff her annuity and interest. On the 6th of February, 1824, an order was made, on the petition of Bayly, by which he was appointed joint-receiver with Stevenson, and they were directed to conform to the directions contained in the order made on the appointment of Stevenson, and such of the other orders previously made on the receivers of the premises, as were then in full force. In pursuance of this last order, Bayly and Stevenson continued to consign the produce of the estates to Stewart and Westmorland, down to the time of filing the bill; and they continued to pay, the annuity and interest, to the plaintiff until the 1st of January, 1825. The receipts given to Stewart and Westmorland for the sums paid by them to the plaintiff, expressed the payments to have been made by the hands of the consignees.

The bill, after stating as above, alleged that Stewart and Westmorland had, from time to time, since January, 1825, received large consignments of sugar and other produce from Bayly, (who, by the death of Stevenson, had become the sole receiver,) and had sold the same, and received the proceeds; that they held and possessed such consignments and proceeds, in trust, amongst other things, to pay, to the plaintiff, her annuity and interest, but that they had applied the same to their own use; and that the annuity and interest remained unpaid since the 1st of January, 1825. The bill charged that Bayly, by the order of the court of chancery in Jamaica, under which he was appointed receiver, was directed, out of the first proceeds of the \*estates, [\*337] to pay, to the plaintiff, her annuity and interest: that he had consigned, to Stewart and Westmorland, and that they had received the produce of the estates subject to the payment of, and in trust, or under orders to pay such annuity and interest: that Bayly and Reid had, from time to time, sent letters to Stewart and Westmorland, directing them to pay the annuity and interest out of the first moneys arising from the sale of the produce of the estates; and that, under such circumstances, Stewart and Westmorland were trustees of those moneys for the plaintiff, to the extent of the payments due to her; that, in consequence of some large mercantile dealings between Bayly and Stewart and Westmorland, Bayly had become indebted to them to a large amount, and that they were colluding with him for the purpose of procuring their claims against him to be satisfied out of the moneys in their hands, which were due to the plaintiff, or which they had received and possessed in trust



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for the plaintiff, to the extent of the payment of her annuity and interest, and that Stewart and Westmorland intended to apply the moneys and produce to their own use, in satisfaction of their claims on Bayly. The bill prayed for an account of what was due, to the plaintiff, for her annuity and interest, since the 1st of January, 1825, and of the produce received by Stewart and Westmorland since that time, and the moneys arisen from the sale thereof: that Stewart and Westmoreland might be decreed to pay, to the plaintiff, what was due to her for her annuity and interest, out of the moneys arisen from the produce of the estates consigned to them: that they might be restrained from applying such moneys to their own use, or to any other purpose than [\*338] that of paying, to the plaintiff, what was due to her; \*and that the orders of the court of chancery in Jamaica might be enforced for the plaintiff's benefit.

The defendants Stewart and Westmorland, put in a general demurrer to the bill for want of equity.

Mr. Sugden, and Mr. Pemberton, for the defendants in support of the demurrer:—The plaintiff was and still is a party to the suit in Jamaica. The receiver was appointed, if not upon her application, with her consent; and the payments to the plaintiff, were directed to be made by the receiver, and not by the consignees, over whom the court has no control, and who are liable to account to no one but their principals. The receivers are charged, in the court in Jamaica, with all the sums which they receive. The plaintiff, who is a party to the suit in that island, has a right to call on them to pass their accounts there. How can she be entitled to file a bill here, for the purpose of taking the same accounts, against the agents, as she has taken, in Jamaica, against the principals. If this plaintiff can file a bill against these consignees, every creditor may, on the same principle, file a bill against them. A *cestui que trust* has no right to follow property which has been handed over, by the trustee, to a third person. If a decree were now made, the receiver might have previously passed his accounts in Jamaica, and paid in his balances. It is not improbable that the rules for taking accounts in Jamaica, are different from what they are here. Is then the account taken here, or the account taken in Jamaica to be binding? The accounts cannot be taken, [\*339] against the \*agent, in the absence of the principal. If this bill is sustained, not only the merchant here, but the officer of the court in Jamaica, will be doubly vexed; for a right of action against him will be given to his agents. There is nothing on the face of these proceedings which can give the plaintiff a right to say that the property in the hands of the consignees is her fund. She cannot succeed, unless she can lay her hand on some part of the property, and say that that is her fund, dedicated to pay her demand. The plaintiff cannot make out such a case of appropriation as will entitle her to the relief she prays. For anything that this court can know, the receiver may be in advance, to the full amount of the consignments, or the receiver may have other demands upon the estate, for the extinction of which the whole

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proceeds of the consignments may be required. In order to give a right of suit to a party for whose benefit a sum of money is transmitted to a third person, that person must bind himself, by his own acts, to apply it for the purpose for which it was transmitted. He must accept it for that purpose. The mere allegation in the bill that these defendants were trustees for the plaintiff, will not give the court jurisdiction, unless it is borne out by the circumstances of the case. Though the defendants might have received orders, from Bayly, to pay, to the plaintiff, her annuity and interest, it does not appear that those orders were communicated to the plaintiff. These defendants never entered into any engagements to make the payments. They may have received the consignments under orders to pay the plaintiff's demands, but they have not acquiesced in those orders. If the plaintiff has any claims, she may enforce them against Bayly. \**Williams v. Everett*, (b) [\*340] *Worrall v. Harford*, (c) *Wallwyn v. Coutts*, (d) *Ex parte South* (e)

Mr. *Bickersteth*, and Mr. *Spedding*, for the plaintiff:—These merchants have been in the course of receiving money for a purpose which they have long applied it to: would it not then be extraordinary if they could not be compelled to go on in the same course? The plaintiff is directed, by the orders, to be paid out of the first proceeds of the estate. The receiver, in the first instance, consigns the goods, and gives directions that, unless the consignees will undertake to pay the plaintiff, the goods are to be delivered, not to the consignees, but to the plaintiff. It was only by the consent of the plaintiff that the consignees could have received the proceeds. The consignees have always received the goods on a clear understanding that, out of the proceeds, the plaintiff was to be paid. No express contract is required to give to the plaintiff the right which she is seeking to enforce. It is sufficient that one may be implied from the proceedings that have taken place. The consignees have received these proceeds under the orders, for the purpose of applying them according to the orders; but, instead of doing so, they have applied them to pay a debt due to them from Bayly. Here is a right in a particular fund declared; and that fund is traced to the hands of a particular person. By acting in obedience to the orders, the consignees have acknowledged the trust; the plaintiff has acted on the faith of it; and, by that means, the \*relation [\*341] of trustee and *cestui que trust* was established. They have never terminated that relation, except by a breach of the engagement. The condition which was imposed on the first consignees, must be considered to have been imposed on all the subsequent consignees.

Mr. *Pemberton*, in reply:—If the defendants have contracted to pay the moneys to the plaintiff, can she file a bill against them in this court? Ought she not to have brought an action for money had and received to her use? If the case be as it is represented, what have the Fitzgeralds and the other defendants to do with it? The receipts express that the moneys were paid by

(b) 14 East, 582.

(c) 8 Ves. 4.

(d) 3 Mer. 707.

(e) 3 Swanst. 392.

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the defendants, as the agents of the receivers. Their principals acted under the orders of the court in Jamaica, but the defendants did not. The allegation, in the bill, is that the receivers, from time to time, gave us orders to pay the money to the plaintiff; but the bill also states that we have now received contrary directions.

The VICE-CHANCELLOR :—I think that there is sufficient charge in this bill to make the defendants liable to account, to the plaintiff, for the sums in their hands.

The short state of the case is this.—[His Honor here detailed the material contents of the bill.]—I do not intend to disturb the rule of law as it is established by *Williams v. Everitt*; but that case does not govern the present one; for all that it decides is that, where an order is given by a debtor, [\*342] to a third \*person, to pay a sum of money to his creditor, and that third person refuses to comply, the creditor cannot maintain an action against him for the amount. *Scott v. Porcher*, (f) is a decision to the same effect: and I apprehend that both those cases are undisputed law. Here it appears that express directions were given to Stewart and Westmorland, to apply the proceeds of the consignments, to keep down the annuity and interest due to the plaintiff; and that, from the time when the receivers were first appointed, down to 1825, the consignees acted under the orders by which the plaintiff received her annuity and interest; and it is charged that Stewart and Westmorland have, since 1825, received directions to keep down the annuity and interest. In this case it has been notified, to the plaintiff, that the consignees have been directed to pay to her the annuity and interest; and when it is stated that they hold the moneys under an express trust to pay her, and are colluding with Bayly for the purpose of procuring their claims against him to be satisfied out of the moneys in their hands which are due to the plaintiff, I cannot but take it to be stated that they hold the moneys applicable to the plaintiff's claim, and that they are colluding with Bayly to defeat that claim.

This court is not ousted of its jurisdiction because the plaintiff might have brought an action, against Stewart and Westmorland for the amount of the annuity and charge.[1] That objection was raised, by the court itself, in *Scott v. Porcher*, (g) and was answered by Mr. Bell; and Sir W. Grant, M. R., made a decree for the plaintiffs. My opinion, therefore, is, without [\*343] meaning to disturb any rule of law, that there is \*enough on this record to enable me to say that these defendants must answer the bill; and I should be defeating the law if I did not make the order I now do.

Demurrer overruled.[1]

(f) 3 Mer. 652.

(g) See 3 Mer. 659.

[1] Vide *Blain v. Agar*, ante, 295.

[2] Affirmed 2 Russ. & M. 457, but on different grounds from those stated above.

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1828.—Noble v. Cass.

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## NOBLE v. CASS.

1828; 17th June, 19th November, and 5th December.—*Tenant for life and remainderman.*

Devise to trustees and their heirs during the life of A. in trust for A. and after his decease, to B. in fee.

The trustees recover, in A.'s life-time, damages for breach of covenants in a lease granted by the testatrix, and still subsisting, A. dies. The damages belong to her estate.

MARY EDWARDS, widow, by her will, bearing date the 13th of October, 1787, devised unto John Cass and Samuel Abbott, and their heirs, a freehold messuage, land and premises, at Walthamstow, upon trust, for her daughter, Ann Edwards, during her life; and after her decease, to the use of Cass and Abbott, and the survivor of them, and the heirs of such survivor, during the life of the testatrix's niece, Ann Noble, then the wife of Joseph Noble, in trust to pay to her the rents and profits thereof during her life, for her separate use; and, after her decease, the testatrix devised the premises unto such child or children of Ann Noble as should be living at her decease, as tenants in common in fee simple; and she appointed Ann Edwards, and Cass and Abbott, her executors.

The testatrix died on the 13th of September, 1789, and her will was proved by all her executors.

Upon the death of the testatrix, the trustees paid the rents of the premises at Walthamstow to Ann Edwards, during her life. She died on the 19th of \*October, 1794, and, upon her death, the trustees paid the [\*344] rents to Ann Noble. Cass survived Abbott, and died in May, 1805, intestate, leaving the defendants, Elizabeth Cass and Phebe Cass, his only children, his co-heirs.

By an indenture dated the 1st of September, 1783, the testatrix had demised the premises to Joseph Noble from the 24th of June then last, for five years, at the rent of 12*l.*, and, from the 24th of June, 1788, for sixty-one years, at the rent of 30*l.*

After divers mesne assignments, the term became, in the year 1814, vested in John Strettle Brickwood: and, in the same year, Elizabeth Cass and Phebe Cass brought an ejectment for, and recovered possession of the estate. In Trinity term, 1815, the same persons brought an action against Brickwood, for breach of the covenants in the lease, and for dilapidations of the premises, and obtained a verdict for 500*l.* damages. The defendants, upon receiving that sum, invested it in the purchase of 672*l.* 2*s.* four per cent. annuities, in their own names. On the 11th of March, 1819, Ann Noble died intestate, leaving the said Joseph Noble, her husband, her surviving, and the plaintiffs, and the defendant, Sophia Noble, her children. Sophia Noble afterwards took out letters of administration to her late mother; and, upon the death of Joseph Noble, his son, the plaintiff Joseph Richard Noble, took out letters of administration to him.

The bill prayed that the dividends accrued due on the 672*l.* 2*s.* stock, in the

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life-time of Ann Noble, might be paid to the defendant Sophia Noble, [\*345] the \*personal representative of Ann Noble, and that the dividends since accrued due, together with the capital, might be transferred and paid to the plaintiffs and the defendant Sophia Noble.

The defendants, Elizabeth Cass and Phebe Cass, in their answer, said that, in the year 1814, an ejectment was brought, in their names and on their behalf, to obtain possession of the estate at Walthamstow, and that they recovered judgment in such action, and that possession of the premises was delivered to them; that, in Trinity term, 1815, they caused an action of covenant to be commenced against Brickwood, for damages for breach of covenants in the lease and dilapidations of the estate, and that they declared, in that action, as assignees, for the life of Ann Noble, of the reversion of the premises expectant upon the lease, and that they recovered a verdict for 500*l.* damages: they added that they had been advised that it was doubtful whether the 500*l.* recovered in the action of covenant, were to be considered as a compensation for the injury done to the estate, which the defendants held, in the freehold premises, for the life of Ann Noble, and in trust for her, and, consequently, as forming part of her personal estate, or as a compensation for the injury done to the inheritance, and consequently, subject, as land, to all the same uses to which the freehold premises were limited by the will.

Mr. *Sugden*, and Mr. *Parker*, for the plaintiffs, contended that the testatrix had, in the first instance, given the fee simple in the estate at Walthamstow to the trustees; and, therefore, that they recovered in the action, not [\*346] only for the benefit of Ann Noble, but of \*all those who were interested in the inheritance; and that, consequently, the 500*l.* formed part of the inheritance.

Mr. *Preston*, and Mr. *Garratt*, for the defendants, Elizabeth Cass and Phebe Cass:—If during the life of a tenant for life, a stranger wrongfully cuts timber on the estate, the tenant for life may bring an action of trespass against him, and the reversioner has a separate and distinct action. Now, what have we in our hands that belongs to the reversioner? Where is the right at law upon which equity is to ingraft its jurisdiction? If there is no right at law, there can be none in equity. A reversioner never gets any of the damages that have been recovered by a tenant for life.

Mr. *Keene*, Mr. *Lloyd*, and Mr. *Paynter*, appeared for other parties.

The VICE-CHANCELLOR:—The question, in this case, is, whether the fund in question belongs to the children of Ann Noble. It was urged, in the argument, that the damages were something accruing to the inheritance; but no authority was produced to show that a court of equity has ever held that damages were any thing but the personal estate of the person who recovered them; and it appears to me that I should be introducing a new equity, if I were to hold that damages recovered in an action for a breach of a covenant running with the land, are to be considered as part of the inheritance.

Then it was said, that this case might be likened to a case where an

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insurance against fire is effected by \*a tenant for life ; and it was [\*347] asserted that, if the money was recovered from the office, it must be considered as going with the land. This point was certainly urged in argument in the case of *Norris v. Harrison*,<sup>(a)</sup> but no authority was cited in support of it. The decision there turned on the acts of the party, and the expressions in the will, and not on any abstract rule of equity, that the money paid on the policy of insurance effected by the tenant for life, was to be considered as belonging to the inheritance. The Vice-Chancellor in his judgment, after stating that he thought that Webb was clearly entitled to the fund, proceeds thus : "the testator, William Bell, appears by his will, to have thought so, for he conscientiously states the circumstances. He appears to set apart the money as belonging to the remainderman, describing it as part of and belonging to what was the real estate of his brother John Bell. If the house had been rebuilt, it would have gone to the persons successively entitled. The insurance was for the benefit of all parties. The money was not laid out but set apart to ameliorate and restore the real estate. Those who claim under the testator cannot dispute his abandonment of any claim on this fund. It is evident that both John, and the testator William Bell, considered this money as liable to the uses of the settlement." I think, therefore, that this case is no authority for me to say that these damages are to be considered as an accretion to the inheritance.

Where a case is at all doubtful, the best way is to follow the law. Now, Littleton says :<sup>(b)</sup> "Also as to \*actions personals, tenants in [\*348] common may have such actions personals jointly in all their names, as of trespass, or of offences which concern their tenements in common, as for breaking their houses, breaking their closes, &c. In this case, tenants in common shall have one action jointly, and shall recover jointly their damages, because the action is in the personalty, and not in the realty." And Lord Coke, in commenting on this section says : "If the aunt and niece join in an action of waste, for waste done in the life of the other sister, the aunt shall recover the damages only, because the same belongs not by law to the niece."<sup>(c)</sup> Therefore it is plain that the spirit of the law is that, with respect to injuries to land for which damages are to be recovered by personal action, the person who brings the action is entitled to the damages. My opinion, therefore, is that the principal fund belongs to the administratrix of Anna Noble.<sup>(d)</sup>

Bill dismissed, with costs.

<sup>(a)</sup> 2 Madd. 268.

<sup>(e)</sup> Co. Litt. 198, a.

<sup>(b)</sup> Sect. 315.

<sup>(d)</sup> See *Evelyn v. Raddish*, 1 Holt's N. P. C. 543.

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 1828.—Thomas v. Montgomery.
 

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## THOMAS V. MONTGOMERY.

1823; 12th and 14th June.—*Application of payments.—Legacy.*

In the progress of a suit for the administration of a testator's assets, which were more than sufficient to pay the legacies with interest, it was ordered that the master should ascertain one-fourth part of the legacies and interest, and that the same should be paid out of a fund in the cause: held, that the payment ought to be applied, first, in discharge of the whole of the interest on the legacies, and then in the reduction of one-fourth of the principal.

THE late Duke of Queensberry died on the 23d of December, 1810, having given, by his will, legacies to a large amount, which he directed should be paid within three months after his decease. By an order made in the [\*349] cause, on the 14th of August, 1817, with the \*concurrence of the residuary legatees, it was referred to the master to compute interest on the legacies, from the date of a former report, and to add the same to the amount of what he had then reported to be due for principal and interest of such legacies; and he was to ascertain one-fourth part of what was due, to each of the legatees, on account of their legacies and interest. And it was ordered that so much of a certain fund in the cause, as would be sufficient to raise what the master should certify to be the one-fourth part of the legacies and interest, should be sold; and that, out of the money to arise by the sale, the one-fourth part of the legacies and interest should be paid to the persons to whom the master should certify the same to be due. In January, 1818, the master reported what was due for interest on the legacies, and added the amount to the principal, and then stated what was one-fourth part of the aggregate sum. That fourth part was afterwards paid. By another order, of the 21st of May, 1824, the master was directed to take an account of what remained due to the legatees, for principal, in respect of their legacies, at the date of his report of January, 1818, after deducting the payment then made, from the amount of the principal and interest, as found by the last mentioned report; and to compute interest upon what he should find to be so remaining due to the legatees, after such deduction, and add such interest to what he should find to have remained due to such legatees, down to the date of his report to be made in pursuance of that order. It appeared, by the report made in obedience to this last order, that the master, in taking the account directed by it, had ascribed the payment made under the order of August, 1817, in discharge, [\*350] first, of the interest then due on the legacies, \*and then of so much of the principal as that payment would extend to discharge. To this report an exception was taken by the residuary legatees, who were defendants.

The exception, after setting forth the order of August, 1817, submitted that, after the payment thereby directed was made, the one-fourth part of the legacies, and the one-fourth part of the interest, became distinguished by virtue of that order, and that three-fourth parts only of the said legacies then remained due.

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*Mr. Horne, Mr. Sugden, Mr. Treslove and Mr. Lynch*, in support of the exception:—The master has put a construction upon the order of August, 1817, which is contrary both to its language and to its spirit; for, instead of referring the payment to the discharge of a fourth of the principal and interest, he has applied it, in the first place, to the discharge of all the interest. The order must be construed according to the rights of the parties; and, when that order was obtained, the legatees could not have gotten a single shilling hostilely to the residuary legatees. The object of the court was not to put the legatees in a better situation than if the cause had been regularly heard for further directions. They would then have been entitled to receive their legacies, with simple interest only; but, if the master's construction is adopted, they will, in effect, receive compound interest, and injustice will be done to the residuary legatees, who would not have consented to the order, unless they had construed the prayer of the petition in the same manner as they now contend that this order ought to be construed. Suppose that, in the ordinary case of \*debtor and creditor, a letter were written, by the creditor to the debtor, [\*351] informing him that a large sum was due for principal and interest, and requesting to be paid one-fourth of the debt, and one-fourth of the interest; and the debtor were to write, to the creditor, that he sent him one-fourth of the debt, and one-fourth of the interest: would the debtor be authorized to apply the money so sent to the extinction of the interest, before he carried any part of it to the reduction of the capital? The only question is, whether or not the legatees are bound to receive the indulgence of the court in the manner in which the court was pleased to grant it, so as to leave three-fourths only of the capital due.

*Mr. Bickersteth, Mr. Rose, Mr. Roupell, and Mr. Boteler*, for the legatees:—By the will, the legatees were entitled to have their legacies paid, at a certain short, limited period after the death of the testator: but, before they could be paid, certain claims upon the testator's assets arose, and in consequence of those claims, the legatees could not have immediate payment; but the court, upon the petition of the legatees, ordered certain sums to be set apart to answer those claims, and then directed the payment in question to be made. Now a payment on account being to be made, in a case where principal and interest are due, is it not of the essence of justice, and according to the custom of all mankind, to attribute that payment, first, to the discharge of the interest, and then to appropriate the remainder to the discharge of the principal. All transactions of such a nature proceed upon this principle, that the person who receives money is to apply it, first, to the discharge of that which is not productive to him, to compensate him for \*the delay which he has [\*352] suffered. The object of the petition was, that the aggregate amount of principal and interest should form one sum; and the order proceeds in the same manner, and treats it as one sum. If the court had not intended to apply the ordinary rule in such cases, the order must have been expressed in totally different terms; for then it must have directed the master to ascertain one-



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 1828.—*Thomas v. Montgomery.*


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fourth of what was due to the legatees, for principal, and one-fourth of what was due to them, for interest; and that one-fourth of the principal, and one-fourth of the interest should be paid. By the order of May, 1824, the master was directed to take an account of what remained due to the legatees, for the principal only, of their legacies. This shows that it was considered as quite clear that a portion of the principal only, could remain due after the payment directed by the previous order.—

[The Vice-Chancellor :—Was there any legacy so constituted as that one-fourth of the principal and interest of it would be less than the amount of the interest ?]

—No: and therefore the legatees never could have had compound interest; and the subsequent order takes it for granted, that one-fourth of the principal and interest exceeded the amount of the interest; for it directs the master to compute what was due for the remaining principal money.

The VICE-CHANCELLOR :—The master, in pursuance of the order of August, 1817, has made his report, and taken an account, so as to give, to the legatees, the benefit of the payments which had been made, by applying them, in the first instance, in discharge of the whole of the interest, and [\*353] \*then in discharge of part of the principal; and the question raised by the exception is, whether this course of proceeding were right or wrong.[1] Now it appears to me that, if the court had ever meant that the payment was to be made in any other manner than as the master conceived, nothing was so easy as for the court to express, in terms, that that should be the form of payment. But the court has used a phrase that appears inconsistent with that; for it has directed that the master should certify the amount of one-fourth of the principal and interest, and not one-fourth of the principal and one-fourth of the interest, that is, it directs only that one-fourth of the gross amount should be paid, and has left it to the law to determine how the payment should be applied.

Now, it is admitted that the assets are more than sufficient to pay the principal and interest of the legacies. How then are the residuary legatees to be paid, until the pecuniary legatees have received all that is due to them for principal and interest. And, without entering into the question of law as to the pecuniary and residuary legatees, it is sufficient to say that it is the peculiar privilege of the pecuniary legatee to have his legacy paid, if there be sufficient to do so; and, therefore, my opinion is, that the master's report, in this case, should be confirmed, and that the exception should be overruled.[2]

[1] Vide *State of Connecticut v. Jackson*, 1 Johns. Ch. Rep. 17. *Grant v. Grant*, 3 Sim. 363.

[2] S. C. 1 Russ. & M. 729.

1828.—Bielefield v. Record.

## \*BIELEFIELD V. RECORD.

[\*354]

1828; 13th June.—*Will.—Construction.—Vesting of portions.*

Testator gave to his widow a life interest in a fund, with a power of appointment, amongst all his children living at her death; and, in default of appointment, directed the fund to be divided amongst all such children, with a gift over to the widow, in case all the children died before their shares became payable.

The widow appointed the fund to the two surviving children; one of them died in her life time.

Held that the only surviving child took, upon the widow's death, the whole of the fund.

JAMES RECORD made his will, dated the 27th of October, 1789, and which was, partly, as follows: "All my copyhold and leasehold estates, and also all the rest and residue of my estate and effects, both real and personal, of what nature or kind soever the same may be or consist of at the time of my death, I give, devise and bequeath unto my wife, Mary Record, Richard Burton, and John Hayter, or the survivors or survivor of them, their heirs, executors, administrators and assigns, in trust to sell and dispose of the same, as soon as conveniently may be after my decease, in such manner as my said wife and the said Richard Burton and John Hayter, or the survivors or survivor of them, shall judge best; and then to put, place out and invest all the moneys arising therefrom (after payment of the expense of such sale) in their names, in some of the public funds, or on government or parliamentary securities, or on such other good securities, at interest, as my said wife, and the said Richard Burton and John Hayter, or the survivors or survivor of them, shall think fit, upon the trusts and to and for the uses, intents and purposes hereinafter mentioned; that is to say, upon trust to pay the yearly interest, dividends and produce thereof unto my said wife, or otherwise permit and suffer her to receive the same, for and during the term of her natural life; and, from and after her decease, upon trust to pay and divide the whole unto and amongst all and every my child or children, as shall be living at the time of the death of my said wife, in such parts and proportions, \*manner and form, as my said [\*355] wife, in her life-time, shall, by any deed or instrument in writing, or by her last will and testament, duly executed and attested, direct, limit, or appoint the same; and, in default thereof, then upon trust to pay and divide the same unto and amongst all and every such child and children, in equal parts and proportions, share and share alike, to such of them as shall be a son or sons, at his or their age or ages of twenty-one years, and to such of them as shall be a daughter or daughters, at her or their age or ages of twenty-one years, or day or days of marriage, which shall first happen, provided such marriage be with the consent of my said trustees, or the survivors or survivor of them; and, in the mean time, I order and direct that the interest of the respective share or shares of such child or children shall be paid and applied for and towards his, her, or their maintenance and education, until his, her, or their share or shares shall become payable as aforesaid; and I do hereby also authorize and empower my said trustees, during the life-time of my said wife,

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1828.—Bielefield v. Record.

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provided the same be with her consent, and afterwards, to apply the respective part or share of any of my children, or so much thereof as they shall judge necessary, in order to put and place out such children to business, or any suitable employ as may be thought best by my said trustees ; but in case it should happen that all my children shall die before their shares shall become payable by virtue of this my will, then I give and bequeath the whole of the said estates and premises hereinbefore mentioned to be settled as aforesaid, unto my said wife Mary Record, her heirs, executors, administrators and assigns. Provided nevertheless, and it is my express will and meaning that, in case my [\*356] said \*wife shall marry or take any future husband, that then and in that case I order and direct that the said estates and premises hereinbefore limited to her for her life as aforesaid, shall immediately go to and devolve upon my said children, in such manner as the same would do in case she was naturally dead, and be paid and applied by my trustees accordingly : and lastly, I do hereby nominate, constitute, and appoint my said wife, Mary Record, together with the said Richard Burton, executrix and executor of this my will, and also guardians of my children."

The testator died in June, 1795, leaving his wife and four children, namely, the defendant, James Record, and Mary Bielefield, and two others, who both died under age and unmarried. In July, 1797, Mary Record, the daughter, with the consent of the trustees of her father's will, married the defendant, John Henry Bielefield. In April, 1798, she attained the age of twenty-one. By a deed poll, dated the 30th of June, 1823, Mrs. Record, in exercise of the power given by the will, appointed part of the property, the subject of it, to her son James Record, and the remainder to her daughter Mary Bielefield. In March, 1827, Mrs. Bielefield died, and her husband became her administrator. Mrs. Record died in May, 1828, having appointed the plaintiff her executor.

The bill alleged that, according to the true construction of the testator's will, Mrs. Record had a power of appointment amongst such children only of the testator as should survive her, and that, in default of her exercising the power, the trust funds were divisible between such surviving children ; [\*357] and that, as \*Mary Bielefield died in the life-time of Mrs. Record, she did not become entitled to any part of the property. Whereas the defendant J. H. Bielefield insisted that the appointment made by Mrs. Record was good and valid, or at least, that, in default of appointment the trust funds were limited by the will, so as to confer vested interests on the children of the testator, as to sons at twenty-one, and as to daughters at twenty-one or marriage, with consent, although they might not survive Mrs. Record ; and that Mary Bielefield, therefore, did, by virtue of the appointment, become entitled to so much of the trust premises as were thereby appointed to her, or that, if the appointment was invalid, she took a vested interest in a moiety of the whole. The bill prayed that the true construction of the will, and the validity of the

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appointment, and the rights and interests of all parties in the trust funds, might be ascertained and declared by the court.

Mr. *Belt* for the plaintiff.

Mr. *Sugden* and Mr. *Moore*, for the defendant James Record:—The testator's widow might have appointed to any of the children; but they must have been living at her death. Although the children did not take vested interests, yet their maintenance and advancement were provided for out of their contingent interests. The cases that will be cited in support of the other defendant's claim, have all depended on the question, whether the word "payable" was to be considered to mean "vested." There is not a single case in which that word has been considered as enlarging the preceding gift. As there was only one child living at the widow's \*death, the event in [\*358] which the power was to be exercised did not arise.

Mr. *Treslove*, and Mr. *Chandless*, for the defendant John H. Bielefield—There is an inconsistency in supposing that the children, who were the objects of the power, must be living at the death of the mother; for that power was to be exercised by deed as well as by will, and, according to the construction contended for by the other defendant, an appointment made in the former manner might fail by the death of the appointee in the life-time of the donee of the power. Several other provisions in the will are inconsistent with the condition that the child should be living at the death of the widow, especially that which directs that, on the widow's marrying again, the children shall take immediately. This case comes within the rule laid down by Sir W. Grant, M. R. in *Howgrave v. Cartier*,<sup>(a)</sup> *Woodcock v. Duke of Dorset*,<sup>(b)</sup> and *Perfect v. Lord Curzon*,<sup>(c)</sup> are also in point.

The VICE-CHANCELLOR:—I see no reason, in this case, why the word "payable" should not receive its ordinary meaning.

The testator describes the objects of the power to be the child or children who should be living at the death of their mother, and directs that, in default of appointment, the fund shall go unto and amongst all and every such child or children, that is, those who \*should be living at her death. [\*359] The proviso for the maintenance and advancement of the children is also correctly expressed; for, during the widow's life, any of the children might be those who would survive the wife. The gift over on the second marriage of the widow, refers to all the children, and not to those only who might be living at the death of the widow.

Declare the defendant James Record to be entitled to the whole fund.<sup>(d)</sup>

(a) 3 V. & B. 79.

(b) 3 Bro. C. C. 569.

(c) 5 Madd. 442.

(d) See *Hotchkin v. Humfrey*, 2 Madd. 65.

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 1828.—Trefusis v. Lord Clinton.
 

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## TREFUSIS v. LORD CLINTON.

1828; 24th July.—*Vendor and purchaser.—Interest.*

A purchaser of a reversion ordered to pay interest on his purchase money from the time of the purchase.

MR. TINNEY moved that a purchaser, under the decree of the court, of a reversion expectant on a life interest, might be ordered to pay interest on his purchase money from the time of his purchase.

Mr. Lynch, for the purchaser, opposed the motion, and cited *Blount v. Blount*.(a)

But the Vice-Chancellor ordered the purchaser to pay interest from the time of his purchase.

[\*360]

## \*WOMBELL v. LAVER.(b)

1828; 19th June.—*Husband and wife.—Bankrupt.*

Husband and wife made a post-nuptial settlement in 1821, of moneys due to the wife. The moneys were received by the trustees, and invested in their names. The husband was a trader, and had committed acts of bankruptcy prior to the settlement. In 1823 he was declared bankrupt; held that his assignees were entitled to the funds. The 6 Geo. 4. c. 16. s. 73, has no retrospective operation.

WILLIAM COCKERTON, by his will, gave to his daughter, the plaintiff, Martha Wombwell, then Martha Cockerton, spinster, a legacy of 1,800*l.*, and appointed his son, William Cockerton, his executor. The legacy was not paid; and, on the 4th of May, 1816, William Cockerton the executor, executed a bond to Martha Cockerton, in the penal sum of 4,000*l.* for securing payment of the 1,800*l.*, with interest at 5*l.* per cent. By another bond, dated the 9th of January, 1821, one William Weld Wren became bound to Martha Cockerton in the penal sum of 1,000*l.* for securing 500*l.* and interest at five per cent. The plaintiff was entitled to other sums in the funds.

In November, 1821, the plaintiff married Walter Wombwell, who possessed himself of all her property, except the two sums secured by the bonds. No settlement was made upon the marriage, but, shortly afterwards, by an indenture, dated the 4th of December, 1821, and made between Walter Wombwell, of the the first part, Martha Wombwell, of the second part, the Rev. Miles Moor and Thomas Laver, of the third part, reciting that the friends of the plaintiff had interposed, and induced W. Wombwell to consent to a settlement being made of the residue of the sums of 1,800*l.* and 500*l.* upon his

[\*361] receiving, for his own use, 1,000*l.*, part thereof: \*in consideration of the premises, and of the marriage, Walter Wombwell and the plain-

(a) 3 Atk. 635.

(b) *Ex relations*, Mr. Bethell. .

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 1828.—*Wombwell v. Laver.*


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tiff, Martha Wombwell, assigned to Milles Moor and Thomas Laver, the two bonds, and the principal sums thereby secured, and the interest thereon, upon trust to compel payment of the sum of 1,000*l.* part of the moneys thereby assigned, and, on receipt thereof, to pay over the same to Walter Wombwell, his executors, administrators or assigns, for his own use, and subject thereto, upon the request in writing of the plaintiff Martha Wombwell, during her life, notwithstanding her coverture, and after her decease, then at the discretion of the trustees, to compel payment of the residue of the 1,800*l.* and 500*l.*, and to invest the same, in the names of the trustees, in the funds, or on real securities, and in the mean time, and after the same should be so got in and invested, upon trust to pay over the dividends or interest into the hands of Martha Wombwell, during her life, for her separate use, and after her decease, upon trust to pay the dividends to Walter Wombwell or his assigns, during his life, and after the decease of the survivor, to pay and assign over the sums of 800*l.* and 500*l.* or the securities on which the same might be invested, to such persons as Martha Wombwell, by her will, notwithstanding her coverture, should appoint, and in default of appointment, to assign the same unto the child, if only one, and if more than one, between all the children of the marriage.

Immediately upon the execution of this indenture, William Cockerton paid 1,000*l.* in part of the bond for 1,800*l.* to Walter Wombwell; and, in September, 1822, the sums of 800*l.* and 500*l.*, the remainder of what was due upon the two bonds, were paid to the trustees \*which together [\*362] with 6*l.* 10*s.* advanced by Martha Wombwell, were laid out in the purchase of 1,300*l.* new 4 per cents in the names of the trustees.

Miles Moor died in the life-time of Thomas Laver. In September, 1823, a commission of bankrupt issued against Walter Wombwell, and the defendant Robert Steers was chosen assignee under the commission. The defendant Steers gave notice to Laver, the trustee, not to pay any further dividends to Mrs. Wombwell; and commenced an action at law against Laver for recovery of the moneys received by him and Moor, as trustees of the settlement, in respect of the bonds. Upon this action being commenced, Martha Wombwell and her children filed the bill in this cause, against Laver and Steers, praying that the settlement might be established, and the defendant Steers be restrained from proceeding in his action.

On the part of the defendant Steers, several witnesses were examined, who proved that Wombwell was a trader at the time of his marriage and of the settlement, and that he had, previously to the date of the settlement, committed many acts of bankruptcy.

Mr. *Pepys*, and Mr. *Wright*, for the plaintiff, insisted that the stock, the subject of the settlement, could not be got at, except through the medium of a court of equity, and that, as the money arose from a legacy, for which the

1828.—Wombwell v. Laver.

bond was merely a security, the plaintiff Martha Wombwell was entitled to a settlement.[1] They relied on *Glaister v. Hewer*.(b)

[\*363] \*Mr. *Bethell* for the defendant *Steers* :—At the date of the settlement it was competent to the husband to have brought an action, in the joint names of himself and his wife, to recover the money due on the bonds : and, inasmuch as the settlement was a voluntary one, and made by a trader, and therefore fraudulent and void, by virtue of the 1st James 1, c. 15, s. 5, that right, as it then existed, passed to his assignee. No retrospective operation can be attributed to the 73d section of the 6th Geo. 4, c. 16. The court has no jurisdiction to interfere against the legal title of the assignee, who is entitled to exercise that right which was vested in the husband at the date of the settlement. *Oswell v. Probert* ;(c) *Macauley v. Philips*.(d) In *Murray v. Lord Elibank*,(e) Lord Eldon says : “the husband, where he can, is entitled to lay hold of his wife’s property, and this court will not interfere.” *Bosvil v. Brander*.(f)

The VICE-CHANCELLOR :—As Mr. *Bethell* has observed, the 73d section of 6 Geo. 4, c. 16, has no retrospective effect : and in this case, the commissioners had exercised their power, by executing a bargain and sale and assignment, to the assignees, prior to the passing of that act of parliament ; and, therefore, that bargain and sale and assignment would pass, to the assignees, all that they could have possessed under the then existing law.

I confess that it appears to me in this case (which must, undoubtedly, be governed according to the law which existed prior to the passing of [\*364] the recent act of \*parliament) that this was a transaction which cannot be supported ; because the husband, by the deed of 1821, after the marriage, professes to assign those funds which had been given to his wife ; and I take it that they would be his debts within the meaning of the statute of James—debts, upon which he might have brought an action, in the joint names of himself and his wife, and, by an action, might have realized the debts under a judgment in the action so brought in the joint names of himself and wife. My opinion, therefore, is that this transaction cannot be supported.

In the case of *Glaister v. Hewer*, it appears that the husband had received the wife’s fortune after marriage, and that he laid it out in the names of himself and wife ; and, in that case, the Master of the Rolls, first thought that the wife had no interest in the estate. But Lord Eldon expressed an opinion that that case was not within the statute of James. Now in this case, persons who are named as trustees in the deed of December, 1821, did, by the authority of the husband, receive money due upon the bonds. They were, therefore, his nominees ; and, having received it, they received it, in my opinion, in point of law, for the benefit of the assignees.

(b) 8 Ves. 195 ; 9 Ves. 12, and 11 Ves. 377.

(c) 2 Ves. jun. 680.

(d) 4 Ves. 15.

(e) 10 Ves. 84.

(f) 1 P. W. 458.

[1] Vide *Pierce v. Thornly*, ante 178.

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1828.—*Collis v. Collis.*

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*\*COLLIS v. COLLIS.*

[\*365]

1828; 24th July.—*Practice.*—*Payment of money into court.*

Moneys directed by a settlement to be laid out in government or real securities, were lent, by the trustees, to the husband, on bond; the trustees were ordered, on motion, to pay the sums into court.

The plaintiffs were the infant children of the defendants, Henry Collis and Selina his wife.

At the time of their marriage, Selina Collis was entitled to two sums of 2,000*l.* each; one of which was due from Thomas Shackle, upon a mortgage; and the other, from Thomas Rolfe, upon a bond, warrant of attorney, and deposit of deeds, with an agreement for a mortgage.

By the settlement made upon the marriage, these two were assigned to Edward Shackle, Robert Fennell, and William Hinds, upon trust to call in or to continue the same, or any part thereof, in the hands of Thomas Shackle and Thomas Rolfe, upon the then securities, or upon any real securities they should think proper; and upon the receipt of the two sums, to lay out the same in their names in the public funds, or upon government or real securities; and to stand possessed of the trust moneys and securities, upon certain trusts for the separate use of Selina Collis, for life, and, after her decease, either in the life-time, or after the decease of Henry Collis, upon certain trusts for the children of the marriage. The settlement contained a power to appoint new trustees.

In December, 1824, Thomas Rolfe executed, to the trustees, a mortgage for securing the payment of the 2,000*l.* due from him.

In May, 1825, Thomas Shackle paid the 2,000*l.* due from him, to the trustees, and that sum, with the \*consent of Henry Collis and his wife, was laid out in the purchase of 2,231*l.* 10*s.* 5*d.* three per cent. consols, in the names of the trustees. [\*366]

By a deed poll, dated the 25th of June, 1825, the trustees, in pursuance of the power in the settlement, appointed the defendants, Charles Collis, Matthias Dupont King, and Henry King, to be trustees of the settlement in their stead.

In July, 1825, the 2,231*l.* 10*s.* 5*d.* three per cent. consols were sold, at the request of Henry Collis and his wife, and the moneys produced by the sale were advanced to Henry Collis, by way of loan, upon his personal security only.

About April, 1826, Thomas Rolfe paid, to the old trustees, the 2,000*l.* due from him; and they, on the 7th April, 1826, paid that sum into the hands of the defendant Matthias Dupont King, on behalf of himself and the other defendants, Charles Collis and Henry King.

Henry Collis was a trader. The object of the suit was to compel an investment of the trust moneys, upon proper securities.



1828.—*Collis v. Collis.*

The defendant Matthias Dupont King, by his answer, admitted the receipt of the 2,000*l.* originally due from Thomas Rolfe, and that he had lent it to the defendant Henry Collis, upon his personal security, in the first instance; but that he had since obtained other securities for that sum, which were not [\*367] immediately available, but that the moneys were not in hazard, and \*that he intended to invest the same upon government or real securities as soon as he could recover the same from the defendant Henry Collis, or his effects. The answer of the same defendant, with respect to the sum of 2,000*l.* originally due from Thomas Shackle, was to the same effect. The answers of the defendants Charles Collis and Henry Collis, with respect to the 2,000*l.* originally due from Thomas Shackle, were to the same effect as the answer of the defendant M. D. King; but, with respect to the 2,000*l.* due from Thomas Rolfe, they said that they believed that the defendant M. D. King had received that sum, and applied it to his own use, although requested by Selina Collis to invest it upon proper securities.

The defendant, Henry King, by his answer, said that the two sums had been lent to Henry Collis, upon his personal security, but did not admit that he was a party to the transactions.

A motion was now made for the plaintiffs, that the defendants, or some or one of them, might be ordered to pay the two sums of 2 000*l.* into court.

Mr. *Wigram* for the motion:—1. The admissions in the answers would entitle the plaintiffs to a decree at the hearing of the cause. 2. In the case of a breach of trust, where the title of the plaintiffs is not disputed, they are entitled, upon such admissions, to have the money brought into court upon motion. The principle is, that the admission of the trustees that they [\*368] have received the money, makes them liable upon \*motion; and then the effect of that admission cannot be got rid of in any other way than by showing a proper application of it. *Beaumont v. Meredith*, (a) *Vigrass v. Binfield*, (b) *Rothwell v. Rothwell*. (c)

Mr. *Sugden*, and Mr. *Slater*, for M. D. King and Henry King.

Mr. *Moore*, for H. Collis and wife.

Mr. *Duckworth*, for Charles Collis.

The Vice-Chancellor ordered that Matthias D. King should, on or before the 4th day of November next, pay, into court, the sum of 2,000*l.*, originally due from Thomas Rolfe, and that the defendants Henry Collis, Charles Collis, and M. D. King should, on or before the same day, pay, into court, the sum of 2,000*l.* originally due from Thomas Shackle. [1]

(a) 3 Ves. &amp; Beam. 180.

(b) 3 Madd. 62.

(c) 2 Sim. &amp; Sta. 217.

[1] If the trustee lends the money of the *cestui que trust* without due security, he will be responsible, in case the borrower becomes insolvent. *Smith v. Smith*, 4 Johns. Ch. Rep. 281. Guardians or trustees may be called to account by infants and required to bring the trust moneys into court, or to give further security to account, when the infants come of age. *Monell v. Monell*, 5 Johns. Ch. Rep. 297.

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 1830.—Long v. Yonge.
 

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\*LONG v. YONGE.(a)

[\*369]

1830 ; 30th April and 1st May.—*Joint Stock Company.—Pleading.—Partise.*

Some of the members of a partnership cannot file a bill, on behalf of themselves and the others, for a dissolution of the partnership : but all the members, however numerous, must be parties to the suit.

THE bill was filed, by forty-seven persons, on behalf of themselves, and all others the members of and partners in The Norwich Equitable Insurance Company, against the survivors of the original directors and trustees of the company, and certain other members of the company who had been appointed by them in the room of the deceased directors and trustees, and also against the executors of the late secretary or registrar. It stated that, in 1807, a company was instituted, at Norwich, called "The Norwich Equitable Insurance Company," for the purpose of effecting insurances on goods and buildings from fire, and that it was established and declared that the society or company should be, and the same was, accordingly, so constituted as to form a partnership between the existing members for the time being : that, upon the formation of the society, and on the 29th of September, 1807, a deed was executed, by the persons who at that time constituted the society or company, by the 1st article of which it was provided that all persons subscribing the deed, or who should be allowed to insure in the society, and their respective executors, administrators, and assigns, being allowed to be and continue as persons insuring in the society, should be deemed members thereof, and be concluded by the covenants and agreements therein \*contained, and should have [\*370] their proportionable share of the profits arising by the same, during the terms of their respective policies. By the 2d article, nine persons, some of whom were since dead, and others were defendants to the bill, were appointed trustees of the company ; and, in their names, all the moneys, purchases and securities of the society, were to be invested and taken ; and the power of electing new trustees, in the room of those who should die, resign, or misconduct themselves, was vested in the surviving or continuing trustees. By the third article, twelve persons, some of whom also were since dead and others were defendants, were appointed directors of the company, and were empowered to accept or reject insurances, and to direct the making and giving out of policies, and to sign the same ; and in case of vacancies occurring in the directorship, they were to be supplied by members chosen by the trustees. By the fourth article, John Steward, since deceased, was appointed secretary or registrar of the company ; and was to have the custody of the books and accounts of the company, and all premiums and other payments were to be paid to him ; and he was to accept insurances, and sign and deliver policies,

(a) As an important question was decided in this case, which was discussed in *Blain v. Agar*, ante, 269, and in other cases that have been lately reported, it was thought advisable to give an early report of it.

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1830.—Long v. Yonge.

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either solely, or jointly with any director, or two directors; and, in case of his office becoming vacant, the trustees were to fill up the vacancy. By the fifth article, the trustees were to appoint three members to be auditors of the accounts of the company; and the balance in the registrar's hands was to be paid to the treasurer. By the ninth article, all insurances, granted by the company, were to continue for any length of time, for which any three of the directors and the registrar should consent, and continue to receive the premiums;

and no insurer was to be entitled to any dividends or shares of the [\*371] \*profits of the company, until the expiration of five years after the date of his policy. By the thirteenth article, it was provided that, at

the expiration of every five years after any policy should be granted, there should be returned or paid, to the insurers, a proportionable dividend of the premiums, and of the profits and savings in the mean time made of the same, after deducting losses and incidental charges. By the fifteenth article, it was provided that, if any member should assign his policy, or should die, the assignor, or the executors or administrators of the deceased member, should, within three calendar months, give notice thereof to the registrar, and bring his policy to the office of the registrar, to the end that such assignment or death might be endorsed on it, and signed by the registrar, and entered in the books of the office; and in default thereof, that the benefit of the policy should be forfeited: and that, in case the directors or registrar should not allow the assignee, or executors or administrators, to remain as insurers, he or they should be entitled to such sum only as should be then payable on the policy, and that the same should thenceforth be null and void. By the eighteenth article it was declared that, if the directors and registrar should think fit to discontinue the insurance of any member, it should be lawful for them to cause the policies of such member to be cancelled, on giving fourteen days notice of their intention, and paying to such member his proportion of the premiums, and of the profits due on his policies, and that all questions relating thereto should be decided by a majority of the directors. By the nineteenth article, the directors

and trustees were empowered, by giving fourteen days notice, to call a [\*372] general meeting of the members, at which any \*matter relating to the company were to be considered of and determined, and, thirty members at least, being present, whose insurances should amount, collectively to 25,000*l.* and upwards, to alter, amend and add to the articles.

The bill further stated that, upon the execution of the deed, the trustees, directors, and registrar entered upon their respective offices; and that, from time to time, policies were issued to various persons, who, thereupon became members of, and partners in, the company. The bill then mentioned the times at which certain of the plaintiffs were admitted as insurers and partners in the company, comprising a period commencing with the year 1807, and terminating with the year 1823; and that those plaintiffs, upon being admitted as insurers, became members of and partners in the company, together with the other existing members, and entitled, with them, to the stock, capital and profits in

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1c30.—Long v Yonge.

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equal shares : that, since the death of John Steward, the plaintiffs had discovered that the business of the company had been greatly mismanaged by the persons who had assumed the conduct thereof : that one of the trustees died in 1808, and others in 1814, 1820, and 1827 : that one of the original directors died in 1810, and others in 1812, 1824, and 1827 : that each of the vacancies ought to have been immediately filled up by the trustees for the time being, so that there might be, at all times, nine trustees and twelve directors ; but that no new trustee or director had been appointed until December, 1829 : that the trustees and directors had, for many years before Steward's decease, neglected their duty, and left the entire management of the affairs of the company \*to Steward : that the accounts of the company had not been [\*373] audited, nor any reports of the affairs thereof made, for several years before Steward's death : that he had taken upon himself to nominate certain persons to act as directors ; but that those persons had, for some time, ceased to act as directors ; but that, whilst they had acted as such, (which was from 1824 down to 1829,) certain of the plaintiffs had become insurers and partners, and that their policies had been signed by John Steward, and also by some of the persons so appointed by him, the last of such policies having been effected and signed in 1829 : that the last-mentioned plaintiffs, upon becoming insurers, had become partners of and members in the company : that, in October, 1829, John Steward died, having appointed the defendants John Henry Steward, George William Steward, Thomas Boston Wilkinson, and Edward Steward, his executors : that John Steward died largely indebted to the company ; and that, upon his decease, the office of registrar became vacant, and that the then surviving original trustees and directors having, for many years, neglected the management of the company, there was no person to represent it, or to superintend the business, which was, in consequence, suspended : that, by reason of the neglect of the trustees to appoint a new trustee as often as any vacancy occurred, the remaining trustees became incompetent to fill up the vacancies in their body, or to appoint a new secretary or registrar : that, on the 21st of December, 1829, a general meeting was held, and attended by a large number of members, whose policies amounted to 150,000*l.*, when it was unanimously resolved that it was expedient to dissolve the society ; and that, on the 4th of March, 1830, a notice \*of dissolution was signed by twelve of [\*374] the members ; and, on the 6th of the same month, it was left at the office of the company, and delivered to the surviving original trustees and directors, and also was inserted in the newspapers published in Norwich and Ipswich : that, notwithstanding the partnership or company had become dissolved as aforesaid, the three survivors of the original trustees had taken upon themselves to appoint six persons (who were also defendants to the bill,) to be new trustees in the room of the original trustees who had died : and that those nine trustees had appointed six persons. (who were also defendants to the bill,) to be directors in the room of the six original directors who had died ; and that the last-mentioned trustees had appointed the defendant Edward Steward, to

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be the new secretary and registrar. The bill charged that the new appointments had not been made according to the deed, and that, under the circumstances aforesaid, the business of the company could not be carried on in the manner directed by the deed, and that it had become and was absolutely dissolved. The bill then charged that the persons who held policies in the company exceeded four thousand; and that, therefore, it would be impracticable to make them all parties to the suit: that a large proportion of them, to the number of several thousands, resided in various parts of the kingdom, at a distance from the county of Norfolk, and that the plaintiffs were ignorant of, and had no means of ascertaining, the names and residences of such last-mentioned partners.

The bill prayed that it might be declared that, under the circumstances aforesaid, and by reason of the neglect \*of the trustees to execute their duties, and particularly to keep up the number of the trustees, the business of the company or partnership could not be carried on according to the directions of the deed, and that the company or partnership had become and was dissolved: that accounts might be taken of the stock and effects of the partnership, and that its concerns might be wound up, and the surplus effects be divided amongst the members; and that an account might be taken of John Steward's receipts and payments, on account of the company; and that the balance found due might be paid, by his executors, out of his assets; and that the trustees, directors and registrar, might be restrained from doing any act under color of their respective pretended offices.

The defendants demurred to the bill for want of equity, and because all the partners in the company had not been made parties; and because several persons who appeared, by the bill, to have acted as directors, had not been made parties to the suit.

The *Solicitor General*, Mr. *Pepys*, and Mr. *Turner*, for the defendants, in support of the demurrer:—The principal question is, whether the plaintiffs are entitled to file this bill without having all the partners before the court. The parties are mutual insurers, and the society is, to all intents and purposes, a partnership. But it stands upon quite a different footing from a partnership for an unlimited period. Every time that a new insurance is made, there is a new contract entered into. It is, therefore, a partnership, which is to continue until the expiration of every insurance, that is to say, for 4,000 different [\*376] periods. Forty-seven of the \*partners cannot, by themselves, put an end to the partnership; nor can that act be done, except with the concurrence of the whole body.

This is a case in which the court cannot proceed in the absence of any of the parties interested. How can the account of a partner, with the company, be taken in his absence? Where a common benefit is to be enforced, or where the act required to be done, is one from which none of the others can withdraw, the court will allow some to sue on behalf of themselves and others: but where the court is required to act against the interest of any of the parties, it cannot

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proceed unless all the parties are on the record. The consequence of granting the prayer of this bill will be to cancel the policies of 4,000 individuals in the absence of them all, except the few who are upon the record. It may not be for the common benefit, nor is there any thing to show that it is the wish of the body, that the partnership should be put an end to.

By the terms of the deed, none but the trustees and directors can call a general meeting; and such a meeting could be convened for the purpose only of continuing, and not of putting an end to the partnership. The general meeting, therefore, that was called, acted against the articles of partnership.

The plaintiffs have conflicting interests. The bill contends that, after the death of the trustee who died in 1808, no valid insurances could be made. Three only of the plaintiffs are holders of policies granted before his death; and the policies of others were signed by the directors who were appointed by Steward; \*therefore, conflicting claims must arise between [\*377] the prior partners and those to whom policies were granted by the directors who were irregularly appointed. Forty-four of the plaintiffs have no claims against the defendants, but have adverse claims against the three other plaintiffs.

By the deed, no insurer is to be entitled to any share of the profits until five years after the effecting of his insurance. Ten or twelve of the plaintiffs have effected insurances within the last five years, and therefore they have interests inconsistent with those of the other plaintiffs whose policies have been effected upwards of five years. *Cholmondeley v. Clinton*(a) decided that persons having conflicting claims, could not be joined as co-plaintiffs.

The bill is filed by the plaintiffs, on behalf of themselves and all the other partners. Now the defendants are partners in the company; they are, therefore, both plaintiffs and defendants.

It will be said, for the plaintiffs, that the partnership has been dissolved by the notice; but that notice has not been served on all the partners. Besides, this partnership was not capable of being dissolved. The bill does not pray that it may be put an end to, but only that the acts stated may be considered as a dissolution. The partnership, therefore, is still subsisting; and, for that reason, the court will not exercise jurisdiction over its affairs.

If the assets are not sufficient to pay the demands \*upon the partnership, how can the court compel contribution from persons who are not parties, to the suit? Suppose that one of the partners who is not a party has been overpaid, how could the court compel him to refund? No decree can be made upon the trustees to pay any share of the profits to the personal representatives of any of the deceased partners, as they are not before the court.

The deceased trustees were answerable, with the survivors, for their acts; but their representatives are not parties to the bill. *Waters v. Taylor*;(b)

(a) See 2 Jac. & Walk. 191.

(b) 15 Ves. 10.

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*Forman v. Homfray*; (c) *Beaumont v. Meredith*; (d) *Weale v. West Middlesex Waterworks Company*; (e) *Blain v. Agar*; (f) *Van Sandau v. Moore*; (g) *Davis v. Fisk*. (h)

Sir C. Wetherell, Mr. Treslove, and Mr. Roupell, for the plaintiffs, in support of the bill:—The case of *Van Sandau v. Moore* has no bearing upon the present question. The decision in that case was, that more persons ought to have been made parties to the bill; not that all the shareholders must be made parties, (i) but that there must be persons on the record to represent [\*379] the company. There is no \*passage, in the report of that case, in which Lord Eldon says, if *Van Sandau's* condition had been that of a member of the company, suing on behalf of himself and all others, against the defendants, that all the members of the institution must have been made parties.

The argument for the defendant goes to this extent, that if events have happened which form a clear and admitted case for a dissolution under the articles, no one partner can file a bill for a dissolution, and to have the concerns wound up, without making all the other partners parties to the suit. Suppose that the articles had required that all policies should be signed by seven directors, and that, by death or retirement, that body had been reduced to three, and, consequently, no valid policies could afterwards be granted, and the partnership would be dissolved in law; can it be said that a court of equity could grant no relief unless all the four thousand insurers were made either plaintiffs or defendants to the suit? Creditors and legatees are permitted to sue on behalf of themselves and others. So, a lord of a manor may file a bill, against some of his tenants, or a rector, against some of his parishioners, to establish a custom. (k) In short, any general right whatever may be established, either by one suing for the body, against the individual who resists the claim, or by the individual who claims the right, against some of the parties who resist the claim. *Good v. Blewit*; (l) *Lloyd v. Loaring*; (m) *Chancey v. May*; (n) *Adair v. The New River Company*. (o) In this last case Lord Eldon [\*380] states the practice of the court upon the \*subject in discussion, to be directly opposite to what he is made to represent it in *Van Sandau v. Moore*. *Cockburn v. Thompson*. (p)

[The Vice-Chancellor:—This case differs from all those that you have cited, because you raise a question as to the rights which the absent partners have, and can those rights be decided in their absence? In *Cockburn v. Thompson*, the bill was filed to make Thompson account for the sums he

(c) 2 V. &amp; B. 329.

(d) 3 V. &amp; B. 180.

(e) 1 J. &amp; W. 358.

(f) 1 Vol. 37, and ante, 286.

(g) 1 Russ. 441.

(h) Gow on Partnership, 113, and Farren on Life Assurance, 128.

(i) This observation, it is presumed, relates to the decision upon the demurrer in the case referred to. The judgment reported by Mr. Russell contains a dictum only of Lord Eldon upon the point; the plaintiff, however, made all the shareholders defendants to his second bill.

(k) See the *Duke of Norfolk v. Myers*, 4 Madd 83.

(l) 13 Ves. 397.

(m) 6 Ves. 773.

(n) Prec. Chan. 592.

(o) 11 Ves. 429.

(p) 16 Ves. 321.

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had received. It was, in effect, a suit against him alone ; and the question was whether he could be heard to say that the society should not proceed against him unless all the members were made parties. If the question had been *bona fide* raised, whether the partnership should be dissolved or not, and some members of the society had been made defendants, who insisted that it should not be dissolved, then the question that arises in this case would have been raised in that ; but there is no resemblance between the two.]

The objection as to want of parties is answered by the charge in the bill, as to the impracticability of making all the insurers parties, and the charge is interrogated to, in the usual manner, for the purpose of obtaining, from the defendants, a discovery of the particulars of which the plaintiffs allege that they are ignorant. The charge referred to takes this case out of the general rule, and puts an end to the demurrer for want of parties. In the common case of an heir at law, who is a necessary party to a suit, it is usual for the plaintiff to allege that he does not know who is the heir, and to call upon the defendant to say who he is.

\*[The Vice-Chancellor:—In a case where there is no connection [\*381] between the plaintiff and the person who is stated to have died, it is allowable to state that the plaintiff does not know, and has no means of learning, who the heir at law is. But here a case is stated in which it is possible to ascertain who the other parties are ; because the policies could not be kept on foot without a knowledge of the parties. If you had stated that there was a book preserved by the officers, in which the names and residences of all the insurers were inserted, and that you had applied to them for an inspection of that book, or a copy of its contents, which they had refused to give, that would have been a very different case. But here the plaintiffs state, merely, that they are ignorant of the names and residences of several of the partners ; and the question is, whether that can be considered as a sufficient excuse for not making those persons parties.](a)

Next, as to the demurrer for want of equity. Events have happened which have either dissolved the partnership, or rendered it impossible to be carried on according to the terms of the deed. In either case we \*have [\*382] a right to come to the court and say that, if it is dissolved by law, we claim to have its affairs wound up, and the property distributed ; but if it is not dissolved by law, we have a right to call upon the court to dissolve it. By the deed there was to be a certain number of trustees and directors,

(a) The bill did contain a charge that the defendants had in their custody, the original partnership deed, and various other writings relating to the matters aforesaid, and, in particular, those that contained lists of the policies granted by the company, and of the names and residences of the holders of them ; and that the plaintiffs had not in their custody or power any writings containing any list or account of the policies or of the names of the persons forming the company ; and that the defendants refused to permit the plaintiffs to inspect or take copies of such writings ; and that the plaintiffs were therefore ignorant of the names of the persons forming the company. This charge, however, does not appear to have been adverted to.



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and a secretary appointed in a certain manner. Every one of these provisions has been violated, and cannot now be carried into effect. It is of no importance whether the plaintiffs say that the partnership cannot be carried on according to the deed, and that the law has put an end to it, or that they have a right to come into a court of equity and say that they will no longer be bound by the acts of officers who have been appointed in violation of the terms of the deed. The deed provides that there shall be always nine trustees and twelve directors. Only three of the former and five of the latter are now living: and many acts have been done by these defective bodies. On Mr. Steward's death there was no power competent to appoint a new secretary; and the duties of that office are such that, without a secretary duly appointed, the business of the partnership cannot be carried on. The plaintiffs are competent to dissolve the partnership, and have given the notice required for that purpose: the court is, therefore, authorized to declare that the partnership is duly dissolved. It is impossible to maintain that persons can be bound to go on with a partnership to be regulated by four trustees and five directors, where the deed prescribes that it shall be managed by a greater number of each.

[\*383] If the plaintiffs are not entitled to have the \*partnership dissolved, they are entitled, at least, to the injunction.(q)

[The Vice-Chancellor: An injunction to restrain the trustees from acting would be virtually a dissolution. Every person taking a policy makes himself a partner, and places himself in a situation to have policies granted to other persons, which may be beneficial to him. He may say, therefore, that, in his absence, those who may be trustees and directors ought not to be restrained from acting in those capacities.]

We do not dispute that a case may be put in which it would be beneficial to go on with the partnership, but we contend that we have a right to say that those trustees and directors are not to carry on the partnership, and that it is dissolved. No policies that have been granted since the vacancies have occurred in the boards of directors and trustees are valid.

[The Vice-Chancellor:—The way in which you argue the case appears to me to show the propriety of having all the persons interested, parties to the suit. The frame of the bill is such that you cannot proceed one step without calling in question the characters of the persons who, *prima facie*, [\*384] ought to be parties. Therefore \*the case now before me seems to differ from all those that you have alluded to, because the bill raises a question whether those persons, who are not parties to the record, have rights which, *prima facie*, they appear to be entitled to claim. And the court is

(q) In *Davis v. Fisk*, which has been before referred to, Lord Eldon, C., is reported to have said, "It must not be understood, from what I am about to say, that I give any opinion whether the plaintiffs might or might not put such a case on the record as would entitle them to a decree for the relief they seek. The question is, whether, on an interlocutory motion, I can do what is asked. If I could not grant the decree as asked, I cannot grant the injunction."

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asked to determine, in their absence, whether they are entitled to the rights of partners.]

The plaintiffs are competent to raise and sustain the rights of those partners who are absent. Although the policies that have been irregularly issued, may be bad at law, yet this court may render them effectual, because the holders of them are not to be charged with the default of the trustees and directors in not filling up the vacancies. For the purpose of the decree, it is not necessary that all the partners should be parties. The court may direct all persons to go before the master, who will determine whether their policies are binding either at law or in equity. According to the view that the counsel for the defendants take of the case, the directors may go on indefinitely granting policies which cannot be enforced in a court of law, and from which no benefit can be derived. None of the assignments of policies that have been made since the death of Mr. Steward, are valid, because there has been no valid appointment of a registrar or secretary to supply his place, and, therefore, no policy can have been endorsed in the manner required, by the deed, to give validity to the assignment of it. If there be no registrar duly appointed, no policy can be cancelled; and, therefore, the society has not the benefit of the protection which is given to it by the 18th article; nor can a dissolution be obtained, as has been contended, under that article.

\*The counsel for the plaintiffs were proceeding to observe upon the [\*385] other objections to the bill; but the Vice-Chancellor intimated that his opinion was so strong upon the question of parties, that it was unnecessary to argue any of the other points; and thereupon the counsel for the defendants waived the other objections.

The VICE-CHANCELLOR:—It appeared to me that it was not at all necessary to enter into the question as to the want of equity, when there was one decisive objection for want of parties; an objection, in fact, of such a nature, that, if it was allowed, it is quite obvious that the suit must perish.

Now the rules with respect to parties are exceedingly plain and intelligible to those who will consider the principle on which they are founded. The general rule is that all parties interested in the subject of the suit, shall be parties to the record. Then there are certain exceptions. And those exceptions, so far as this particular point is concerned, may be divided into two parts. One exception is, where several persons having distinct rights against a common fund, or against one individual, are allowed, a few of them, on behalf of themselves and the rest, to file a bill for the purpose of prosecuting their mutual rights against the common fund, or the individual liable to their demand. The other exception is, where a person may have a right against several individuals, who are liable to common obligations. In that case, a bill is allowed to be filed, by a single plaintiff, against some, but not all, of those persons who are bound to make good the plaintiff's demand. This is the general division of the exceptions to the general rule.

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[\*386] \*Then we have to consider whether this case falls within either of those exceptions.

If, in this case, the bill had been filed by some of the members of the society, against an individual upon whom the whole society had a demand, it is perfectly clear that he could not have made an objection that all the members were not parties; and the rule, laid down by Lord Eldon, in the cases of *Cockburn v. Thompson*, and *Adair v. The New River Company*, would have obviously applied. But the very nature and object of this suit is to deprive persons who are not parties on the record, of that right, which, upon the face of the bill, they at present possess; and it appears to me that this case is as distinct, from the two that I have mentioned, as a case can be, and that it is precisely governed by the principle upon which Lord Eldon allowed the demurrer to the first bill filed by Mr. Van Sandau. By that bill, which Mr. Van Sandau filed against certain members of the British Annuity Company, he prayed: "That the company, and the defendants on behalf of the company, might be restrained from doing any act to deprive him of his share, or from acting on the deed of settlement." It might be perfectly true that he had a good case to show that the deed of settlement, which had been executed, was not a proper deed of settlement. Then all the members of the company had acceded to the deed of settlement. He, therefore, by his bill against some of the members, asked, not only to deprive them, but others, who were extremely numerous, of the benefits they were entitled to. On the objection being made, for want of parties, Lord Eldon allowed it.

[\*387] \*I have very little to do with the observations made upon the second part of the case, because it arises on the second bill, in which all the shareholders had been made parties. It is only observable, with respect to what did take place on the subject of the second bill, that Lord Eldon says, "I have not forgotten that, in the course of the argument, Mr. Van Sandau stated that, when he got the answers of some of the defendants, he could amend the bill, by making it a bill on behalf of himself and others of the partners, except such of them as he should retain as defendants." Then Lord Eldon adds, "but, in my judgment, that cannot be done." The consequence, therefore, was, that Lord Eldon did, in effect, pronounce, in the second suit, the same opinion as he had pronounced in the first suit, when he allowed the demurrer to the first bill for want of parties. Then the case of *Davis v. Fisk*, and the other cases that have been alluded to, from *Chancey v. May* down to the present time, show to me, most distinctly, that, if this bill asks to deprive 4,000 persons of their present rights, the plaintiffs ought not to be at liberty to stir in the case, until they have made every one of those individuals parties. That is my clear opinion, and I have no doubt whatever about it; and I think, therefore, that the demurrer must be allowed, and the costs must follow in the usual way.[1]

[1] The authority of this case is shaken, if not overruled, by Lord Cottingham in *Wallworth v. Holt*, 4 Myl. & Cr. 619, January 15, 1841. A bill was filed by some of the shareholders of an in-

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1828; 25th July.—*Judgment creditor.—Equity.*

A receiver appointed in a suit instituted by incumbrancers was ordered to keep down the incumbrances out of the rents, and to pay the residue to the owner of the estate. A judgment creditor may file a bill against the owner and receiver, without making the other incumbrancers parties, to have his debt satisfied out of the surplus rents.

THE bill (which was filed on the 28th of June, 1828,) stated that the plaintiff had lately obtained a judgment in the court of king's bench, against the defendant, Lord Zouche, for 1,229*l.*, and had, thereupon, issued an *elegit*, directed to the sheriff of Sussex, commanding him to deliver to the plaintiff all the goods and chattels of the defendant in his bailiwick; and also a moiety of all the lands and tenements in his bailiwick, whereof the defendant, or any person or persons in trust for him, on the 12th of June, in the 9th year of his present majesty, (on which day the judgment was given,) or ever afterwards, was seised: to hold, &c.: that the writ was returnable on the 22d of June, 1828; that the plaintiff had, lately, obtained another judgment, in the same court, against the same defendant, for 220*l.* 10*s.*, and had issued an *elegit* thereon, returnable on the same day: that the sheriff had returned, on both writs, that the defendant had not any goods and chattels in his bailiwick which he could cause to be delivered to the plaintiff, nor had he, or any person or persons in trust for him, on the 12th of June, in the 9th year, &c., or at any time since, any lands or tenements in his bailiwick, which he could cause to be delivered to the

solvent joint stock bank, on behalf of themselves and all other shareholders, except the defendants, against the directors some of whom had become bankrupt, and the trustees and public officers of the company, and certain shareholders, who were alleged to have not paid up their calls, praying that an account might be taken of all the partnership assets, and that such part as was outstanding might be got in by a receiver, and that the whole might be converted into money, and applied towards satisfaction of the partnership debts: a demurrer was overruled, and the chancellor uses the following strong language:—"How far this court will interfere between partners, except in cases of dissolution has been the subject of much difference of opinion, upon which it is not my purpose to say anything beyond what is necessary for the decision of this case; but there are strong authorities for holding that to a bill praying a dissolution all the partners must be parties; and this bill alleges that they are so numerous as to make that impossible. The result therefore of these two rules would be,—the one binding the court to withhold its jurisdiction except upon bills praying a dissolution, and the other requiring that all the partners should be parties to a bill praying it; that the door of this court should be shut in all cases in which the partners or shareholders, are too numerous to be made parties, which in the present state of the transactions of mankind, would be an absolute denial of justice to a large portion of the subjects of the realm in some of the most important of their affairs. This result is quite sufficient to show that this cannot be the law; for as I have said upon other occasions, I think it is the duty of this court to adapt its practice and course of proceeding to the existing state of society; and not by too strict an adherence to forms and rules, established under different circumstances, to decline to administer justice, and to enforce rights for which there is no other remedy. This has always been the principle of this court, though not at all times sufficiently attended to. It is the ground upon which the court has, in many cases, dispensed with the presence of parties who would, according to the general practice, have been necessary parties." *Ibid.* 637. And see *Fish v. Howland*, 1 Paige, 20. *Egberts v. Wood*, 3 Paige, 520. *Walker v. Devereaux*, 4 Paige, 246.

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plaintiff: that Lord Zouche, being seised of or well entitled unto several manors, messuages, &c. in the county of Sussex, for his life, subject to several incumbrances, by an order of the court of chancery, dated the 23d of May,

1822, made in a cause wherein Nicholas Winckley was plaintiff, [\*389] \*and Lord Zouche and Harriet Anne his wife, Thomas Rhoades, Joseph Rose and Robert Curzon, and Harriet Anne his wife, were defendants, it was referred. to one of the masters of the court, to inquire and state to the court, the several incumbrances affecting the real estates of Lord Zouche, in the county of Sussex; and also to state their priorities, and to appoint a receiver of those estates: that, on the 9th of July, 1820, the master appointed the defendant, John Rose to be such receiver: that, on the 19th of March, 1823, the master, after stating the title, (a) reported the incumbrances to be annuities payable to Lady Zouche. Mrs. Curzon, Nicholas Winckley, Thomas Rhoades, Joseph Rose, and some other persons, and stated their priorities: that, on the 8th of July, 1824, the report was confirmed, and the receiver was ordered to pay the annuities, according to their priorities, out of the rents of the estates, and to pay the residue of those rents to Lord Zouche, until the further order of the court: that Lord Zouche had parted with the legal estate in the hereditaments: that, if all the annuities were subsisting, there would be a clear annual residue of the rents amounting to 3,873*l.*; and that some of the annuities had ceased since the master made his report: and that there was, then, a clear annual residue of the rents, amounting to 5,073*l.*, after paying the subsisting charges. The bill prayed that the receiver might be ordered to pay, to the plaintiff, the principal, and interest due on his two judgments, after keeping down the charges; and that the receiver might be restrained from [\*390] paying, to Lord Zouche, and that Lord Zouche \*might be restrained from receiving any of the rents until the plaintiff should have been paid his principal and interest.

Lord Zouche, and John Rose, the other defendant, demurred to the bill, for want of equity; and because Nicholas Winckley, Lady Zouche, Thomas Rhoades, Joseph Rose, and Robert Curzon, and Harriet Anne his wife, were not parties to it, although it appeared, by the plaintiff's own showing, that they ought to have been made parties.

The demurrer came on to be heard at the same time as a motion, made by the plaintiff, for an injunction as prayed by the bill, or that the receiver might be ordered, after keeping down the incumbrances, to pay, either to the plaintiff, or into court, the money secured by the judgments, and the residue of the rents to Lord Zouche.

Mr. Barber, and Mr. Lynch, in support of the demurrer:—This is a bill *primæ impressionis*. A judgment creditor has no right to apply to this court, except to remove legal impediments. It would be a very strong measure to

(a) The nature of Lord Zouche's title did not appear upon the bill otherwise than as is here stated.

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make an order that he should be paid out of the rents, and for an injunction. *Bennett v. Box*.(b) *Pratt v. Colt*.(c) [Mr. Sugden, for the plaintiff:—Those cases were decided before the statute of frauds.] The statute of frauds, certainly, does allow an equitable estate to be taken in execution, but then \*it must be a trust for the debtor.(d) The sheriff has returned [\*391] that Lord Zouche had no lands in his bailiwick; and this estate not being a subject of execution at law, is not a subject of execution in equity. The point was not expressly decided in *Lord Dillon v. Plaskett*.(e) In that case there was no demurrer; and, therefore, the parties submitted to the jurisdiction of the court; and there was no other suit pending. Besides, there was 5,000*l.* a year to be paid to Lord Dillon: but Lord Zouche is not entitled to receive any definite sum.

There are other fatal objections to this suit. The bill states the pendency of another suit; and that the court has taken possession of the estates in that suit. There cannot be two suits by creditors. If this bill is sustained, and there are twenty judgments against Lord Zouche, every one of the creditors may file a new bill, and call on the receiver to hand over the rents and profits to him. The plaintiff might have had the benefit of the former suit, by obtaining an order, in it, that he might go in and be examined *pro interesse suo*; and he might have got the injunction under that order. The surplus, after paying the charges and the receiver's poundage, is to be paid over to Lord Zouche; and, therefore, it is the subject-matter of account in the other suit. At all events, if this bill is to be sustained, all the parties to that suit must be parties to this suit also; as they have a right to be present at the taking of the accounts which are necessary for the purpose of ascertaining the residue.

\*If these arguments apply to the case of Lord Zouche, they may [\*392] be urged, with still greater force, with respect to Mr. Rose. He is only a receiver; and the bill seeks to restrain him from doing what he has been ordered to do in the former suit. Suppose that he had been made a party to thirty suits; how is he to be paid his costs? Has he a preferable lien for them to that of the creditors? If he has, they ought all to be made parties to the suit.

Mr. Sugden, and Mr. Moore, for the plaintiff, in support of the bill, were stopped by the court.

The VICE-CHANCELLOR:—By the order in the cause of *Winckley v. Lord Zouche*, the receiver was directed to pay certain sums, out of the rents and profits of his lordship's estates in Sussex, to certain persons, and the residue of those rents was to be paid to Lord Zouche. He, therefore, is the owner of those estates, except so far as a court of equity has rendered it impossible for any person to deal with them; and he has an interest in them, for he is entitled to the residue of the rents.

(b) Ca. Cha. 12.

(d) *Harris v. Pugh*, 4 Bing. 335.

(c) Ca. Cha. 128. S. C. 2 Freeman, 139.

(e) 2 Bligh's New Series, 239.

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 1828.—Green v. Green.
 

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It has been said that this bill has been improperly filed, because the plaintiff might have come in and been examined *pro interesse suo*, in the former suit. That may be true as applied to the same fund; and, perhaps, he might have done so in this case; but that does not deprive him of the right to file a bill to have his judgment satisfied.

Then it is said that the object of the bill is incongruous with the [\*393] order in the first suit. But it appears \*to me that that is not so; for the bill is filed on the footing of that order. Next, it is objected that Lord Zouche is not seised either in law or in equity: but my opinion is, that he is seised entirely in equity; and that, but for the officer of the court, he would have a right to the possession of the estates.

The next objection is, that there is a defect of parties. But it would have been improper to make the prior creditors parties to this suit, as their rights are not sought to be affected by it. Mr. Rose is in possession of the estates; and if he were not a party to the suit I could not make any order upon him. upon the whole, therefore, it seems to me that there is not the least ground for either of the demurrers.

Demurrers overruled.

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The order made upon the motion, was that the receiver, after keeping down the incumbrances, should, out of the rents, pay into court the sums secured by the judgments, and that he should be restrained from paying, and Lord Zouche from receiving any part, of the rents until such payment should be made, or until the further order of the court.[1]

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[\*394]

\*GREEN V. GREEN.(a)

1828: 2d August.—*Practice*.

Three defendants were ordered to deliver up possession of estates to the receiver, within a certain time, or to stand committed: but no writ of execution of the order was served on them. The defendants having refused to obey the order, the serjeant-at-arms was ordered to go against them. On the defendants being brought up in custody, it appeared that one of them was an infant, and he and another of them expressing contrition, were ordered to be discharged on payment of costs; the third persisting in his contempt, was committed. The two others remained in custody, being unable to pay their costs. A motion afterwards made, by the defendants, to discharge the orders of commitment, for irregularity, was granted.

(a) The editor was compelled, by indisposition, to be absent from court when this case was argued. He is indebted to his friend, Mr. E. F. Moore, for the above report.

[1] Vide *Cocker v. Lord Egmont*, 6 Sim. 311. In the case in the text the bill alleged that an *elegit* had been issued and returned. In a recent case it was held that the want of alleging the issuing an *elegit* was demurrable; but it seems unnecessary to state that it had been returned; *Neate v. Duke of Marlborough*, 3 Myl. & Cr. 407. A judgment creditor proceeding under the revised statutes of New-York, part 3, ch. 1, tit. 2, art. 2, § 41, 2 R. S. 2d ed. 102, must by the terms of the act have issued an execution, which had been returned unsatisfied, in whole or in part. As to what is a sufficient averment of the issuing and return of an execution, see *Conant v. Sparkes*, 3 Edw. V. C. Rep. 104.

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1828.—Green v. Green.

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THOMAS GREEN, by his will, dated the 3d of August, 1805, gave his real and personal estates to his sons, Joseph Green and William Green, their heirs, executors, administrators and assigns; and directed them to pay, thereout, 850*l.* unto his younger sons, the plaintiffs. Thomas Green, John Green, and Edward Green; and appointed William Green and Joseph Green his executors. William Green died in December, 1812, leaving the defendant Joseph Green his eldest son and heir at law, and the defendant Mary Green his widow and administratrix. Joseph Green, the other executor, died in April, 1816, having by his will, dated in February, 1816, given his real and personal estates to the defendants Illingworth and Roberts, upon certain trusts. In October, 1820, a suit was instituted by the legatees, for the purpose of having the will of Thomas Green established, and the trusts thereof carried into execution. On the 3d of December, 1825, a decree was made, which, after establishing the will, and directing the execution of the trusts, and the usual accounts to be taken, ordered that, in case the personal estate should be insufficient for the payment of the testator's debts and legacies, then that \*a sufficient [\*395] part of the real estates should be sold for payment thereof.

On the 14th of March, 1826, an order was obtained by the plaintiffs for the appointment of a receiver of Thomas Green's real estates, which directed that the tenants of such estates should attorn and pay their rents to such receiver, and that such parts as were then in the possession of any of the defendants should be delivered up to such receiver.

In pursuance of this order, a receiver was appointed.

It appeared that three of the defendants, namely, Thomas Green, Joseph Green, and George Green, (who were the sons of Joseph Green the surviving executor of the testator Thomas Green,) were in the possession of a certain messuage and dwelling house in Wakefield, in the county of York, part of the real estates of the testator. A notice was, accordingly, given to them, on the 22d March, 1828, by the receiver, which recited the order under which he had been appointed, and required them to deliver up to him immediate possession of such parts of the real estates as were then in their possession.

To this notice no attention was paid by these defendants, who refused either to attorn to the receiver, or to give up possession of the premises. On the 6th June, 1828, a motion was made for the committal of these defendants to the Fleet prison, for a contempt, in refusing to attorn, or deliver up, to the receiver, possession of "certain premises," part of the estates in question, and then in the occupation of the defendants. Upon this motion an order was made, by the \*Vice-Chancellor, whereby the three defendants [\*396] were directed to deliver up possession of the premises to the receiver, within a week from the date thereof, or, in default, to stand committed to the Fleet prison.

The time limited by this order was, subsequently, enlarged to the 10th of July following, by an order made on the 20th of June, 1828. No writ of execution of this or either of the previous orders was taken out. On the 17th



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July, 1828, it appearing that, on service of the last order on the defendants and possession being demanded, they still refused to deliver up possession of of the premises, the serjeant-at-arms was ordered to go against them.

The defendants being brought to the bar of the court in the custody of the serjeant-at-arms, Mr. Cooper moved for their commitment to the Fleet, upon a statement of the previous facts, and their continued contumacy. It then appeared that George Green was an infant.

Upon the court admonishing the defendants on their contempt, John and George Green expressed their contrition, and willingness to give up possession of the premises as far as was in their power, and they were thereupon ordered to be discharged out of the custody of the serjeant-at-arms, upon payment of the costs incurred by their contempt. Thomas Green, the other defendant, still persisting in his contempt, and expressing his determination to retain possession of the premises, having at that moment the key of them in his pocket, was committed to the Fleet. The costs not being paid by the two other defendants, they remained still in the custody of the serjeant-at-arms.

[\*397] \*A motion was now made to discharge the orders of the 20th June, and 17th July, for irregularity, and that the warrants, issued against the defendants under the last mentioned order, might be set aside, and the defendants discharged out of custody touching their alleged contempt, and that the costs of and occasioned by the application might be paid, by the plaintiffs, to the defendants.

Mr. *Agar*, and Mr. *Knight*, for the motion :—The proceedings in this case are wholly irregular. Several persons cannot be included in one notice, they being alleged guilty of several contempts. If process go against them, they cannot be relieved from the process until each has cleared his separate contempt. This would be a manifest injustice.

The parties here are distinct, and have no interest in common ; the notices should have been given to them individually. Two of the defendants, in their affidavit, swear that they have no interest or claim whatever in the property in question, and reside only with their brother as boarders, one inhabiting a bed room only, being employed in the business of an upholsterer in another part of the town, and the other living with his brother, and assisting him in his business in the capacity of a servant ; and they both positively swear that, although they boarded and lodged with Thomas Green, they have no right or claim to any part of the property in question, and that they have never, in their lives, had any control over it.

One of the defendants is an infant. His commitment must be irregular.

[\*398] \*The principle of the court is never to interfere with the liberty of the subject, where there are other means within its power for obtaining that which it seeks. If the signature to an instrument is necessary, that, being the act of the party, can only be enforced by personal restraint.

Where the object has been to put a party in possession of property, if the

1828.—Green v. Green.

court can obtain that by its own proceedings, there is no authority for putting the person in prison. The court cannot proceed in both ways at the same time.

The notice given by the receiver, on the 22d of March, requiring the defendants to deliver up immediate possession of the premises, was improper. A receiver is not authorized, by the practice of the court, to require an individual to give up immediate and instantaneous possession of the property, which he believes himself, at the time, to be holding legally, having inherited it from his ancestors. The notice given previously to the motion for the commitment of the defendants for the alleged contempt, was informal. It merely required that "certain premises" should be given up, without giving the slightest description of what those premises were. It was impossible for the defendants to know from the terms of the notice, what the premises were of which it was required that they should give possession. No notice was given, to the defendants, that the court would be moved to commit them provided they did not deliver up possession within a certain time. But a notice was served, informing them that, on a certain day, a motion would be made for their commitment, \*for not having delivered up possession. They were not [\*399] bound to regard any of these notices.

The apprehension of the defendants, by a serjeant-at-arms, was both illegal and irregular.

The VICE-CHANCELLOR :—[After consulting with the registrar.] Where the persons are parties in the cause, I understand it is the practice that a serjeant-at-arms should go against them ; otherwise, if they are not parties.

The question is not material. In this case the whole proceedings are improper. There is not a single case in support of the course pursued here. The practice has been contrary for the space of 200 years. It is first pointed out by Lord Bacon, in his ninth order, where it is directed : " that in case of a decree, made for the possession of land, a writ of execution goeth forth ; and, if that be disobeyed, then process of contempt, according to the course of the court, against the person, to commission of rebellion, and then a serjeant-at-arms, by special warrant, and in case the serjeant-at-arms cannot find him, or be resisted, upon the coming in of the party, and his commitment, if he persist in disobedience, an injunction is to be granted for the possession ; and in case that also be disobeyed, then a commission to put him in possession." (a)

The same course of proceedings is laid down in Tothill, 44. In *Stribley v. Hawkie*, (b) it was decided that, after a writ of execution of a decree, and an attachment served on the defendant, the plaintiff may have an injunction \*to deliver possession, and then a writ of assistance to the [\*400] sheriff, commanding him to be aiding and assisting in putting the party in possession. *Edwards v. Pool* (c) is to the same effect. There a commission of rebellion was refused, on special motion, it being a process which,

(a) Beames' orders, 6.

(b) 3 Atk. 275.

(c) 2 Dick. 693.

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if warranted by the previous process, issues of course. In that case, after process run out to a sequestration, the tenant in possession refused to deliver up possession; and Mr. Dickens states the practice to be for the court, upon the certificate of the sequestrator, to grant an order to enjoin him to deliver possession to the sequestrator, and that, upon service of the order and disobedience, an attachment issues of course, (which is not to be executed,) and that, upon this, the court will order a writ of assistance to put the sequestrator into possession: and he cites two cases where orders to that effect were made by Lord Hardwicke. In *Dove v. Dove*(d) a writ of assistance was granted upon affidavit of service of the injunction, and disobedience to it. There the whole process was run out. And, in Mr. Dicken's report of this case, all the previous authorities on this point are collected. It appears that, from the earliest records of this court, the practice has been uniform and unvaried.

Whenever there is an order, there must be a writ of execution. This is the first process after the order for delivering up possession of the premises; and in this case it is specially directed by Lord Bacon's order. Here the committal is obtained immediately on the breach of the order, no writ of execution having been moved for.

[\*401] \*The case of *Ferguson v. Tadman*(e) is precisely in point.

There an order was made, on the 25th of June, 1817, for the appointment of a receiver, and the defendants were ordered to deliver, to the person to be appointed receiver, the premises in their possession. No time was limited. On the 27th of August, 1819, an order was made that service of a writ of execution of the order of the 25th of June, on their clerk in court, should be deemed good service. The writ was served accordingly. On the 5th of November following an application was made, that the plaintiffs might be at liberty to sue out a writ of assistance; whereupon the court ordered that the receiver should give a week's notice, to the defendants, of his having been appointed receiver, and that he would attend, on a day to be named in such notice, to demand and receive possession of the premises, in the occupation of the defendants, pursuant to the order of the 25th of June, and that service on the defendants' clerk in court, should be deemed good service. On the 14th of December an order was made, that the plaintiffs' clerk in court should be at liberty to issue an attachment against the defendants for not obeying the order of the 25th of June. On the 18th of the same month an attachment issued, but the court directed that it should not be executed; and, on the same day, an order was made, for the defendants to deliver possession of the premises within a week from the service of the writ; and on the 15th of January, 1820, a writ of assistance was granted, directed to the sheriff, to put the receiver into possession of the premises.

(d) 2 Dick. 617. S. C. 1 Bro. C. C. 375; and 1 Cox, 101.

(e) Cited from a MS. note furnished by the registrar. See post, 410.

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\*In *Saunders v. Saunders*(f) a decree was made on the 15th February, [\*402] 1822, by which the estates in question were directed to be sold. Edward Wigan having become the purchaser of part of the estates, and the purchase money having been ordered to be paid into court, an order was made, on the 5th of November, 1823, on the application of the purchaser, that Elizabeth Saunders, who was in possession of the premises, should deliver up possession to the purchaser. This order was not proceeded on; but, on the 28th of May, 1824, an order was made, on the application of the plaintiff, that the defendant, Elizabeth Saunders, should deliver possession of the estates to Edward Wigan, the purchaser, within fifteen days. The defendant was served with a writ of execution of this order on the same day. An attachment was granted against the defendant, on the 18th of June, following, for not obeying the writ of execution; and, on the 7th of July, a writ of injunction was issued; but possession not having been delivered up, a writ of assistance was ordered on the 22d of the same month. This case is decisive of the point unless there be a difference between the case of a purchaser and a receiver. The case of *Ferguson v. Tadman*, shows that no such distinction exists; for that was the case of a receiver.

The writ of injunction is obtained on motion of course, and is the only ground for a writ of assistance. *Huguenin v. Baseley*.(g) After service of the writ of injunction, and disobedience of it, then a writ \*of [\*403] assistance must be moved for; and not a motion made to commit for contempt of the order. This has been the uniform practice from the time of Lord Bacon down to the present time.

Mr. Sugden, and Mr. Cooper, opposed the motion.

I. There was no occasion to proceed against these defendants separately. Here are three brothers in joint possession, living together in the same house, and all claiming an interest in the property, and acting, all along, in concert together. No objection is made, by either of them, when taken in execution, for want of personal notice. If there had been any informality in not serving them, individually, with notice, they have waived it by their acquiescence.

This is no improper interference with the liberty of the subject: the parties were in contempt. In the case of an injunction, on breach of it, the court commits immediately. There is no delay on account of the liberty of the subject. Whenever a party appears in court, and acknowledges a contempt of an order of the court, the court will commit for breach of its order. Tothill, 33; Wyatt's Prac. Reg. 137.

If the process is irregular, the defendant must clear his contempt before he can set it aside. *Vowles v. Young*; (h) *Anon*; (i) Harrison's Ch. Prac. 160; Ed. 1808.

The parties must obey the original order before they can question

(f) Cited from a MS. note furnished by the registrar. See post, 408.

(g) 15 Ves. 180.

(h) 9 Ves. 172.

(i) 15 Ves. 174.

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[\*404] the process. It is no objection that one \*of the defendants is a minor.

An infant may be committed for contempt. Tothill, 108. *Re Beech*.(k) The order of the 14th of March, directing a receiver to be appointed to whom the defendants were to attorn, cannot be resisted. This is a material consideration, for the defendants' refusal to deliver up possession of the premises in question, in pursuance of that order, was a substantial contempt.

II. We admit Lord Bacon's order to be in force. The practice there laid down, and since followed in the cases cited, does not supersede that which we have adopted. There were two courses open for us. The order is part of the decree. An attachment is the next process under Lord Bacon's order, then an injunction, and then a writ of assistance. We moved to commit, in the first instance, for breach of the decree. The practice we adopted has these advantages: it is less expensive, and more expeditious. There are numerous instances where persons have been committed for not obeying the decrees of this court. A case is reported in Tothill, 40, of the committal of a husband and wife, for refusing to concur in the sale of a lease. In *Manly v. Eyton*,(l) a tenant was ordered to stand committed for non-payment of rent, without a day being given. In *The Attorney-General v. The Mayor of Coventry*,(m) the mayor was committed for not obeying an order. *Skip v. Harwood*;(n) *Lansdown v. Elderton*;(o) *Wilkins v. Stevens*;(p) and Harrison's Ch. Prac. 475, and 333.

[\*405] \*The VICE-CHANCELLOR :—This is an application to discharge the two orders of the 20th of June, and 17th of July, for irregularity, and to liberate the persons in custody for contempt of those orders.

The passage from Lord Bacon's order applies to the case where there has been a decree. The cases of *Ferguson v. Tadman*, *Saunders v. Saunders*, and *Dove v. Dove*, are in point with that order.

The case now before the court is where a receiver has been appointed, and is exactly parrallel to *Ferguson v. Tadman*. There the steps taken were in conformity to Lord Bacon's order. The plaintiffs have produced no authority for the propriety of the practice they have adopted. There is a material distinction between an order to do, and an order to restrain from doing, a particular act. The same difference exists where the thing sought is possession, or the doing a particular act. The case of *Ferguson v. Tadman* exemplifies this principle. I think the order of the 20th of June is wrong; but it is not necessary to decide that. It was not stated, on obtaining that order, that George Green was an infant; that was incorrect. The order of the 20th of June, not being complied with, that of the 17th of July, is obtained. No writ of execution appears to have been taken out. The practice is, that, when an order is obtained and acted upon, it must appear that a writ of execution has

(k) 4 Mad. 128.

(n) 3 Atk. 564.

(l) 1 Dick. 183.

(o) 14 Ves. 512.

(m) 2 Dick. 781.

(p) 19 Ves. 117.

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been taken out. The orders of the 20th of June, and the 17th of July, are therefore wrong. The first order was wrong, as not complying with the established practice ; and the second was \*wrong, because it was [\*406] founded upon the first, and the court had no notice of one of the parties being an infant. When the parties were produced before me, I did not think myself authorized to interfere with the execution of the orders.

The orders must be discharged, the persons liberated and the party obtaining the orders must pay the costs.(q)[1]

The Vice-Chancellor was furnished, by Mr. Bedwell, the registrar, with the following extracts, from Reg. Lib. relative to the course of proceeding against a party for not delivering up possession of estates.

*Stribley v. Hawkey* :—Decree dated 6th July, 1742. Reg. Lib. B. 1741, fo. 349, defendant Hawkey ordered to convey the premises in his possession, and deliver deeds to the plaintiff.

7th June, 1744, Reg. Lib. B. 1743, fo. 406 ; defendant Hawkey ordered to deliver possession to plaintiff, pursuant to decree, and the tenants to attorn to the plaintiff, unless the defendant should on a day thereby appointed show good cause to the contrary.

30th June, 1744, Reg. Lib. B. 1743, fo. 433 ; the last order made absolute. The defendant Hawkey was served with a writ of execution of the order of the 30th June, 1744.

\*6th November, 1744, Reg. Lib. B. 1744, fo. 3 ; an attachment [\*407] directed to the sheriff of Cornwall, against the defendant Hawkey, for not delivering possession.

28th November, 1744, Reg. Lib. B. 1774, fo. 23 ; order for an injunction against defendant Hawkey to deliver possession.

It is stated, in this order, that the sheriff returned a *cepi corpus* upon the

(p) See post, 430.

[1] If a decree of sale of mortgaged premises contain a direction that the person in possession deliver possession to the purchaser, a formal writ of execution of the decretal order to deliver possession is proper ; but when there is no such direction, there must be an order obtained that the party deliver up possession, which must be served upon him. If the order is ineffectual, (and the same practice it would seem must apply to a formal execution) then follows the injunction, and then the writ of assistance. The attachment on the disobedience to the order is a useless proceeding, since it is not to be served, and it clearly may be dispensed with. *Kershaw v. Thompson*, 4 Johns. Ch. Rep. 609. A purchaser under a decree of foreclosure is not entitled to a writ of assistance to turn a person out of possession of the mortgaged premises, although such person went into possession *pendente lite*, unless he went into possession under or by the permission of some one of the parties to the suit. *Van Hook v. Throckmorton*, 8 Paige. 33. A purchaser at a master's sale is entitled to a writ of assistance to put him in possession of the mortgaged premises as against the defendants in the suit, or those who have gone into possession under them *pendente lite* : but the court is not bound to grant a writ of assistance to a subsequent purchaser from the purchaser at the master's sale ; and it will not therefore grant such writ, if injustice will be done thereby. *Ibid.*

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1828.—*May v. Flook.*

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attachment, therefore it must have been executed ; but it does not appear, by the entry of any order, that the defendant applied to the court to discharge it.

18th December, 1744, Reg. Lib. B. 1744, fo. 43 ; order for a writ of assistance directed to the sheriff of Cornwall, to put plaintiff into possession.

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*May v. Flook.*—Decree dated the 20th of May, 1772, Reg. Lib. B. 1771, fo. 480 ; decree, for defendant, Flook, to deliver possession to plaintiff of the estates of the testator.

The defendant Flook was served with a writ of execution of the decree, and not obeying it, an attachment issued against him, which was executed, and he was taken into custody.

28th June, 1773, Reg. Lib. B. 1772, fo. 342 ; defendant ordered to be discharged out of custody, with costs of the application and of the attachment, to be taxed by the master if the parties differed ; and a writ of injunction ordered for defendant Flook to deliver possession, to the plaintiff, pursuant to the decree.

[\*408] \*6th July, 1773, Reg. Lib. B. 1772, fo. 358 ; order for a writ of assistance, directed to the sheriff, to put plaintiff into possession.

3d February, 1774, Reg. Lib. B. 1773, fo. 132 ; the defendant brought an action for assault and imprisonment. The court, upon the plaintiff this day applying to stay the proceedings, and submitting to make the defendant Flook such satisfaction for his imprisonment on the attachment, as should be approved of by the master, ordered that it should be referred to the master, to consider what would be a reasonable satisfaction to the defendant in respect thereof, and ordered the plaintiff to pay the same to the defendant Flook, together with the costs directed by the former order of the 28th day of June, 1773.

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*Saunders v. Saunders.*—Reg. Lib. B. 1821, fo. 721, decree dated 15th February, 1822. The estates were directed to be sold, with the approbation of the master, wherein all proper parties were to join as the master should direct.

The estates were sold, and Edward Wigan became the purchaser.

Reg. Lib. B. 1822, fo. 1635 ; order dated the 25th of July, 1823, for Edward Wigan to pay in his purchase money, and to be let into possession.

The defendant, Elizabeth Saunders, refused to deliver possession to the purchaser, Edward Wigan.

5th November, 1823, Reg. Lib. B. 1822, fo. 1911 ; on the application of Edward Wigan, the purchaser, \*order for defendant, Elizabeth Saunders, to deliver possession of the estate to him. This order, on the application of the purchaser, was considered wrong, and was not proceeded upon.

Reg. Lib. B. 1823, fo. 1024, 28th of May, 1824 ; order made on the application of the plaintiffs that the defendant, Elizabeth Saunders, should

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1828.—*Ferguson v. Tadman*.

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deliver possession of the estate to Edward Wigan, the purchaser within fifteen days.

The defendant, Elizabeth Saunders, was served with a writ of execution of the order of the 28th May, 1824.

18th June, 1824.—Reg. Lib. B. 1823, fo. 1196; an attachment against the defendant, Elizabeth Saunders, directed to the sheriff, for not obeying the writ of execution.

7th July, 1824.—Reg. Lib. B. 1823, fo. 1231; on the application of the plaintiffs; order for a writ of injunction against defendant to deliver possession to Edward Wigan, the purchaser.

15th July, 1824.—Reg. Lib. B. 1822, fo. 1291; order that service of the writ of injunction at the defendant's dwelling house should be deemed good service on the defendant, Elizabeth Saunders.

22d July, 1824.—Reg. Lib. B. 1823, fo. 1336; on the application of the plaintiffs for a writ of assistance, directed to the sheriff of Staffordshire, to put Edward Wigan into possession it was ordered accordingly.

\**Ferguson v. Tadman*.—25th June, 1819.—Reg. Lib. A. 1818, [\*410] fo. 1809; order for the appointment of a receiver, and the defendants to deliver, to the person to be appointed receiver, the premises in their possession. Not any time limited.

27th August, 1819.—Reg. Lib. A. 1818, fo. 1833; ordered that service of a writ of execution of the order, dated the 25th day of June, 1819, on the clerk in court of the defendants, should be deemed good service on the defendants.

5th November, 1819.—Reg. Lib. A. 1818, fo. 2080; order made, upon application of plaintiffs, that they might be at liberty to sue out a writ of assistance. The court ordered that the receiver should give a week's notice, to the defendants, of his having been appointed receiver: and that he would attend, on a day to be named in such notice to demand and receive possession of the premises in the possession or occupation of the defendants, pursuant to the order, dated the 25th June, 1818; and that service of such notice on the defendants' clerk in court, should be deemed good service on the defendants.

14th December, 1819.—Reg. Lib. A. 1819, fo. 130; order for the plaintiffs' clerk in court to be at liberty to issue an attachment against the defendants for not obeying the order of the 25th of June, 1819.

18th December, 1819.—Reg. Lib. A. 1819, fo. 186; an attachment directed to the sheriff of Kent against the defendants, for breach of the writ of execution of the order dated 25th June, 1819.

\*18th December, 1819.—Reg. Lib. A. 1819, fo. 169; order for a [\*411] writ of injunction for the defendants to deliver possession to the receiver, and that service upon the defendant's clerk in court should be deemed good service on the defendants.



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1828.—The Corporation of Trinity House v. Burge.

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15th January, 1820.—Reg. Lib. A. 1819, fo. 228; order for a writ of assistance, directed to the sheriff of Kent, to put the receiver into possession of the premises.

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### THE CORPORATION OF TRINITY HOUSE v. BURGE.

1828; 19th November.—*Defendant.*—*Plea.*—*Penalties.*

If a defendant pleads that giving the discovery sought by the bill will subject him to penalties, but between the filing and the hearing of the plea, the time for suing for the penalties expires, the plea will be overruled.

THE bill stated that, under certain letters patent and acts of parliament, the plaintiffs were, and, for a very great number of years last past, had been seised in fee of the lastage and ballastage, and office of lastage and ballastage, of all ships and vessels which sail, pass and repass in the river Thames, or elsewhere, between London Bridge and the main sea, eastward, and the exclusive right of supplying of ballast to all such ships and vessels: that the defendant, in contravention of the plaintiff's rights, had, between the 11th of February and 21st of April, 1827, supplied a great number of ships or vessels, sailing as aforesaid, with large quantities of ballast.

The bill charged that the defendant ought to set forth an account of [\*412] the quantity of ballast which had been \*so sold or supplied by him during the last-mentioned period, and of all the sums of money received by him in respect thereof.

The bill then prayed for a discovery of the several matters therein alleged, and for an account of the ballast which had been sold or supplied by the defendant as before mentioned, and that he might be decreed to pay to the plaintiffs what should be found due from him, and be restrained from supplying with ballast any ships or vessels sailing as aforesaid.

To the discovery sought by the bill, the defendant pleaded the 45th Geo. 3, c. 98, by which it was enacted: "that every person not duly authorized by the Corporation of the Trinity House, who should supply, with ballast, any ship or vessel between London Bridge and the main sea, should, for every ton of ballast so supplied, forfeit the sum of 10*l*." But, under this act of parliament, no penalty could be recovered, unless it was sued for before the expiration of twelve months from the time when it was incurred; and that period expired before the plea was heard, but after it was filed.

Mr. *Wigram*, for the plaintiffs:—The circumstances under which this case comes before the court are unusual. The plea, which goes to the discovery only, was good at the time it was pleaded, because, at that time, the answer of the defendant might have subjected him to the penalties of the act of parliament; but the time limited by the act of parliament having expired, [\*413] the reason upon which the plea is \*founded, fails the defendant now.

This is not the only peculiarity in the case. In ordinary cases, the

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court, upon argument of a plea, decides the case with reference to the form and substance only of the plea. If the plea, though good in form and substance as pleaded, should, from any extrinsic circumstances, be bad, the plaintiffs, in an ulterior proceeding, may take the opinion of the court upon that point also.(a) Now, in this case, the court is bound judicially to know, *at this time*, that the plea, with reference to the facts of the case, is bad. There is no reason, therefore, why the court should not now give that judgment which the form, the substance, and the truth of the plea together call for. There are, however, the strongest reasons why the judgment of the court should not be postponed; for, at no other time can the plaintiffs have any benefit from the judgment of the court in their favor. This is not a plea in bar of the suit, or in abatement of the suit. It is a plea to the plaintiffs' evidence; and, if the final judgment of the court be not given till the hearing of the cause, it will come too late to assist the plaintiffs. It may be said that the court, at the hearing of the cause, might order the defendant to be examined upon interrogatories, as in the case of a plea to the relief which is found false at the hearing.[1] It must be admitted that the court might do so; but as, in this case, there is no subject for inquiry; there is no reason why the delay and expense of such a course should be permitted. There is no objection to answering the bill at this stage of the cause, which would not equally apply to answering interrogatories in a later stage. If, therefore, the defendant is to answer at all, he should, if not as a matter of right, at least as a measure of [\*414] convenience, answer now.

In this case it is admitted that the plea was good, both in form and in substance, at the time it was pleaded; but the reason upon which it proceeds has ceased to exist. The question, therefore, is, whether the court is compelled to found its judgment upon the case as it stood at the time of the plea pleaded, or whether it is not at liberty to decide it upon the case as it stands at the time the judgment of the court is pronounced. In *Grene v. Gascoigne*,(b) the report of the case is in these words: "In debt on bond of 100*l.* the defendant pleaded in bar to the action, outlawry in the plaintiff, and showed it in certain. The plaintiff replied, *nul tiel record*: upon which the defendant had a day until the next term to bring in the record; and, in the mean time, the plaintiff reversed the outlawry, whereby it is now become in law *nul tiel record*: according to 4 H, 7, 12. Yelverton moved the court, for the defendants, that although this is in law a failure of record, yet the defendant ought not to be condemned, but a *respondeat ouster* shall be awarded: according to 6th Eliz. Dyer, 228, a., who puts the case, that the failure of the record is not peremptory: and so adjudged *per curiam*; for, in fact, there is no default in the defendant, his plea being true at the time of pleading it." *Ison v. Gray*,(c) and Co. Litt. 127, b., are to the same effect. These cases show that the truth of a plea at the time

(a) Mitf. 243, 244.

(b) Yelverton, 36.

(c) Cro. Jac. 484.

[1] *Dowe v. McMichael*, 2 Paige, 345, 1 Hoff. Pract. 323. Labe's Eq. Plead. 37.

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it is pleaded, does not deprive the court of the power to decide upon it with reference to the facts of the case as they stand at the time its judgment [\*415] \*is given, where the justice and convenience of the case require that it should be so decided. In this case the time limited by the act of parliament for the recovery of penalties, has expired, no new proceeding, therefore, can be instituted. It is not pretended that any proceeding is now depending, and there is no principle upon which the court, in favor of the pleader, can intend that such is the case. The defendant has had the full benefit of his plea, and there is now no reason why it should remain on record to the plaintiffs' prejudice. If the plea should be allowed, the plaintiffs must either dismiss their bill, and file a new bill in the very same words, to which the defendant must answer; or else the plaintiffs must examine from 50 to 100 witnesses to prove their case, the whole costs of which must ultimately fall upon the defendant. The course, therefore, which the justice and convenience of the case alike require, is that the plea should be overruled, with liberty to the defendant to make such new defence as he may be advised to make.

The precise point which arises in this case upon a plea, was decided, in the case of *Williams v. Farrington*,<sup>(d)</sup> upon exceptions to an answer. It was argued in that case, as it has been in this, that, as the answer was sufficient at the time it was filed; it could not become insufficient by matter subsequent: but the Lord Chancellor said that, as the time within which the penalties must be recovered, had expired at the time when the second answer came in, the defendant could not protect himself from answering, although at the [\*416] time of putting in his first answer, to which the \*exceptions had been taken, the objection to answering was valid, and the answer sufficient.

Mr. Roupell, for the defendant:—The cases that have been cited from Yelverton and Cro. Jac. have no application: as they are only cases in which a disability was removed. The plea is a defence applying to the record as it stood when the plea was filed. The court cannot go out of the record to find circumstances to defeat the defence, but ought to consider it as it was at the time when it was made, and, if it was good then, to give it effect now.

The VICE-CHANCELLOR:—The question is whether, inasmuch as, at the time when the plea was filed, proceedings might have been taken for the recovery of the penalties, the defendant is protected from answering, although, at the time when the plea is heard, the period limited by the act of parliament for taking those proceedings, is expired. It is a settled rule that a court of equity will not compel a defendant to make a discovery which will subject him to pains and penalties:[1] and, if this plea had been heard at the time when it was filed, the principle of the rule would have applied to the case of this defendant. But as it is manifest that, if the defendant gives the discovery now, he will not be subjected to any pains or penalties, the reason of the

(d) 2 Cox, 202.

[1] *Green v. Weaver*, 1 Sim. 404, 433, note.

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rule wholly fails; and, therefore, I think that this plea ought to be overruled.[2]

\*COOK v. BLUNT.

[\*417]

1828; 12th and 14th June, and 4th November.—*Tithes.—Parties.*

To a bill by a vicar for some of the tithes of certain lands, no persons except the occupiers ought to be made parties, although they allege that the tithes in question have been always received or demanded by the rector, and state that it is uncertain whether their lands are or not within the parish.

THE bill was filed, by the vicar of Whittlesea St. Andrew, in the Isle of Ely, for all the tithes of the parish, except those of corn, grain and hay.

The impropriate rectors of the parish were, in the first instance, made defendants to the bill; but their names were afterwards struck out, and the bill was dismissed as against them.

The bill alleged that the impropriate rectory, and the right to the tithes of corn, grain and hay, in the parish of Whittlesea St. Andrew, and the impropriate rectory, and the right to all tithes, both great and small, of the adjoining parish of Whittlesea St. Mary, belonged, and had, for some hundred years, belonged to the same persons, and been held and enjoyed as one property: that the number of persons interested in the two rectories was thirty, and that, by reason of their number and the complication of their interests, the plaintiff had desisted from making them parties. The bill charged that the Reverend T. Moore, a former vicar, did, during his life, receive, from the owners and occupiers of the impropriate rectory of Whittlesea St. Andrew, an annual sum of 200*l.*, which was paid in lieu or satisfaction of or for the small tithes of that parish; and that the owners and occupiers of the rectory did, during the same period, continue to receive the small tithes of the parish, and that the present impropriators still continued to receive and demand, from the occupiers of lands in the parish, the small tithes \*thereof: but that, never- [418] theless, it appeared, from their own title deeds, and from many of their agreements with the present and former occupiers, that the right to the small tithes was in the vicar, and that the impropriators had not, nor ever had any claim thereto, except as lessees or farmers of vicars, the plaintiff's predecessors.

The defendants, in their answers, said that they were tenants of lands under the impropriate rectors of both parishes: that the boundaries of the two parishes of Whittlesea St. Andrew and Whittlesea St. Mary were unknown, and that they could not set forth whether the farms and lands occupied by them were in the one or in the other parish: that they believed that the impropriate rec-

[2] A plea that the complainant was an alien enemy, is sufficiently answered by a treaty of peace made after it was filed, and there is no need for the plaintiff to reply that matter; the court is bound to notice it *ex officio*; *Johnson v. Harrison*, Little's (Kentucky,) Select Cases, 226.

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tors did receive, and still continued to receive, and demand the small tithes of the parish of Whittlesea St. Andrew from the occupiers of lands in that parish: and they submitted that the rectors ought not to be dispensed with as parties.

Mr. *Bickersteth*, Mr. *Tinney* and Mr. *Sidebottom*, for the plaintiff.

Mr. *Horne* and Mr. *Knight* for the defendants, in support of the objection for want of parties:—The plaintiff alleges, by his bill, that the improper rectors still continue to receive and demand, the small tithes, from the occupiers of lands in the parish; but that it appears, by their title deeds, that they have no right to them. It appears, therefore, from the plaintiff's own statement,

that the contest is not between him and the occupiers, but between [\*419] him and the rectors, and \*that his evidence is to be found in their title deeds. The plaintiff, therefore, shows that the evidence, which it was necessary to resort to, was not in the power of the defendants now on the record, but in the power of the rectors. Now, what could be more unfair than that, after the rectors had put in their answers denying the plaintiff's title, he should not have continued them before the court?

It is impossible that the court should make such a decree as is asked for, in the absence of the only parties who ever claimed these tithes. The defendants, according to the plaintiff's own showing, are not the persons who are withholding the tithes. The rectors are the person who are receiving them from the defendants, either in kind, or in the shape of increased rent, on account of their lands being let to them tithe-free.

Where the defence made is either that the rector, as against the vicar, or the vicar, as against the rector, claims the tithes in question in a suit, and either of those persons is absent from the record, the court must judge for itself, according to the nature of the case and the general principles of courts of equity, whether justice can be effectually done, without having either the one or the other of those persons, as the case may be, upon the record. That is the rule that was laid down by Sir T. Plumer in *Daws v. Benn.*(a) *Wallis v.*

*Pain & Underhill*,(b) is an authority to the same effect. The rule [420] was followed in *Clarke v. Stapler*,(c) \*and *Steers v. Brassier*.(d)

The particular circumstances of this case render it highly necessary that the rector should be made a party to this suit, as the perception of those tithes has always been in him, and the vicar, as a claimant of tithes, is a perfect stranger to the occupiers. The rector should be here to defend his rights, when an inheritance, which has been enjoyed by him and his ancestors from time immemorial, is sought to be taken from him. The plaintiff, if he succeeds in this suit, will compel the occupiers to pay to him the arrears of the tithes which he claims, for six years prior to the filing of his bill: but the occupiers, owing to the acquiescence or lying by of the vicar, will not be able to recover, from the rectors, what they have paid, prior to the period of six years from the commencement of any proceeding that they may take for that purpose.

(a) 1 J. &amp; W. 513.

(c) 3 Gwill. 926.

(b) 2 Gwill. 749. Com. Rep. 633.

(d) 2 Gwill. 749.

1828.—Cook v. Blunt.

The court is asked, in this suit, to decide, in the absence of the rector, not only whether the vicar was ever endowed of the tithes which he seeks to recover, and, if he was so endowed, whether, under the circumstances of the case, a re-grant of those tithes ought not to be presumed; but also whether the lands, the tithes of which are claimed, are or are not within the parish. The object of a court of equity is, by one decree, to do final and complete justice upon the matter before it. But how can all the questions that are raised upon this record be finally determined, without having the rectors, the lords of the two manors, and the vicar of the adjoining parish, before the court?

\*The VICE-CHANCELLOR :—In this case the bill is filed by the plaintiff, who claims, as vicar of the parish of Whittlesea St. Andrew, to be entitled to all tithes, except the tithes of corn, grain and hay; and he has filed his bill against several defendants, who are alleged to be occupiers of land in the parish of Whittlesea St. Andrew.

Now the defendants, by their answer, admit the presentation, institution and induction of the plaintiff; but they put in issue the question, whether the benefice is a vicarage or not; and then, admitting that they do occupy lands in the places which are mentioned in the bill, they raise a question whether those lands are in the parish of Whittlesea St. Andrew, or not. They do not affirm that the lands are not in that parish, nor do they affirm that the lands are in any parish specified; but they only raise the question, whether the lands, alleged in the bill to be occupied by them, are in that parish of Whittlesea St. Andrew: and they also raise the question, whether the plaintiff, if he be vicar, be entitled to the tithes which are other than the tithes of corn, grain and hay: and it is represented that certain persons, who are improPRIATORS, are, themselves, entitled to those tithes: and the question is expressly raised, upon the record, whether or not the improPRIATORS should be parties.

Now I am of opinion that it was not necessary, in this case, to make the improPRIATORS parties: and I am of that opinion upon the authority of the cases of *Williams v. Price*(e) and *Williamson v. Hutton*.(f) \*I [\*422] think they ought not to have been parties; and that they have been properly omitted as parties: and I ground my opinion upon the very reasons adopted, by the Lord Chief Baron, in his decisions upon those two cases. In the first, he assigns as a reason, that no decree could be made against the improPRIATOR: and, in the second, that a bill for an account of tithes is a mere possessory bill. It was alleged that there were decisions to the contrary; and the decision that was relied upon as an opposite decision, was the case of *Daws v. Benn*(g), which was a case at the rolls.

Now, in the judgment which was delivered, by Sir Thomas Plumer, in the case of *Daws v. Benn*, he relied upon the case of *Wallis v. Pain*.(h) But it is observable that, in that case, which was heard in 1738, the bill was filed

(e) 4 Price, 156. (f) 9 Price, 187. (g) 1 J. & W. 513. (h) 2 Gwill. 749. Com. Rep. 633.  
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by the lessee of the impropiator, and the cause was ordered to stand over, to make the vicar a party ; and the consequence of that was, not that any decree was made for the vicar, but that the bill was dismissed with costs. Therefore what took place in that case exemplifies the truth of what the Lord Chief Baron said in one of the cases I have referred to, namely, that there could be no decree for the vicar, (that is to say,) for that ecclesiastical person who was represented, by the occupier, to have a claim opposed to that of the plaintiff.

In the two cases which I shall next mention, it appears that the adverse claimant, who was the vicar in the first, and the impropiator in the second, was made a party. The first of these cases is *Steers v. \*Brasier*,<sup>(i)</sup> which was decided in the year 1736 ; and there a decree was made against the vicar. It is extremely doubtful whether such a decree could be supported ; because the question was, whether the occupiers were to pay tithes or not, to the plaintiff ; and if they had made a composition for the tithes, which they had paid to some other person, it seems a very singular thing, in a tithe cause, to make one ecclesiastical person, who had received payment from the occupier, hand over, to the other ecclesiastical person, who was the plaintiff, what the first had so received. However, there was a like decree in the case of *Clarke v. Stapler*,<sup>(k)</sup> and there a decree was made against the impropiator.

But the case of *Daws v. Benn* is essentially distinct from the present case ; and the judgment of *Daws v. Benn* does not, of necessity overrule the decisions of the late Lord Chief Baron. Because, in the case of *Daws v. Benn*, the vicar was, at first, made a party, the bill being there filed by a person claiming in the character of rector ; and, in the progress of the suit, the vicar died, and the suit was brought to a hearing with a manifest defect of parties upon the record ; because the vicar, having been made a party originally, and having died, it then appeared that there were no representatives of that person who were parties upon the record, neither was the successor of the vicar made a party : and, therefore, abstracted from all other considerations, I conceive that the judgment in *Daws v. Benn*, was right, upon the very ground which Sir Thomas Plumer, at last, takes in his judgment ; because  
 \*424] the previous matter into which he entered only \*related to the point generally, but did not, of necessity bring him to the conclusion which he finally adopted, having regard to the state of that particular record.

Now, in the present case, the record comes to a hearing with the vicar as plaintiff, and certain persons named as occupiers, as defendants ; and, therefore, there is no defect of parties apparant upon the record, as there was in *Daws v. Benn*.

It is to be observed that the opinion of Lord Chief Baron Richards is sup-

(i) 2 Gwill. 742.

(k) 3 Gwill. 926.

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 1828.—*Davies v. Wescomb.*


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ported by the decision in *Hodgson v. Smith*,<sup>(1)</sup> where, though the vicar was not a party to a bill by the impropiator against the occupiers, the court decided for the plaintiff, against the defendants, who set up a title in the vicar, with whom they had compounded. That appears to me, therefore, to be one of the strongest authorities that can be cited for the purpose of showing that it cannot be laid down as a general proposition, that, where one person claiming by an ecclesiastical title files his bill against the occupiers, it is necessary to make another person, claiming by some other right, as vicar or as impropiator, a party to the suit, merely because the occupiers, who are defendants, say that the person is, himself, entitled to the tithes.

Now, in this case, the impropiators were first made parties and then were struck out; but had they remained upon the record, I could not have made any declaration of right which would have given to them the fruits of these tithes. The only consequence of having it made out, upon this bill, that the vicar was \*not entitled, would have been that those [\*425] persons in whose favor no decree could have been made, would have had the bill dismissed as against them, with costs, to be paid by the plaintiff. I am, therefore, of opinion upon that general ground that, in this case, it was right to omit the impropiators; and I am further of opinion that, if there be any weakness in the general ground, yet when it does appear, as found upon this record, that the character of impropiator and rector is divided amongst such a numerous body of persons as appear to be interested in the impropiator's tithes, that was an additional reason why, in this case, they should not be made parties to the record.[1]

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 DAVIES V. WESCOMB.

1828; 15th July.—*Tenant for life.*

Devise to trustees, in trust to sell, for payment of testator's debts, and subject thereto, to A. for life, ~~sans waste~~, remainder to his first and other sons in tail. The trustees sold timber on the estates, and applied the proceeds in payment of the debts: Held, that A. was entitled to have the amount raised by sale of the estates, and paid to him.

THE testator in this case, after devising a real estate to his widow, and bequeathing to her his personal estate, exempt from the payment of his debts, devised the residue of his real estates, to trustees, in trust to sell for payment of his debts; and subject thereto, he gave the same estates to his sister, Frances, (who afterwards married Charles Thruston,) for life, without impeachment of waste with remainder to her first and other sons in tail.

The trustees sold part only of the estates, and cut down and sold timber and

(1) 2 Wood, 51.

[1] *Tooth v. The Dean and Chapter of Canterbury*, 3 Sim. 49.



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1828.—*The Attorney General v. The Mayor and Corporation of Carlisle.*

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other wood on other parts of the estates, and applied the proceeds in payment of the debts.

[\*426] \*Pending the suit Mrs. Thruston died, and her husband took out letters of administration to her.

The cause having come on for further directions, Mr. *Pemberton*, for Mr. Thruston, said that he did not mean to contend that the trustees could have sold the estate separate from the timber, but that they had no right to denude the estate, of timber, and sell it for payment of the debts, when the trust was to sell the estates for that purpose ; and that they ought to have sold a competent part of the estates with the timber upon them. He referred to *Cholmeley v. Paxton*, (a) and *Burges v. Lamb*. (b)

Mr. *Thompson* appeared for the eldest son of Mr. and Mr. Thruston, who was an infant, and said that the whole estate was subject to the payment of the debts, and that therefore the timber was rightly sold for that purpose.

Mr. *Turner* and Mr. *Bichner* appeared for other parties.

The VICE-CHANCELLOR :—By the act of the trustee, the wood and timber, which would have belonged to the tenant for life, have been applied in relieving the inheritance from a burden to which it was subjected by the testator : and therefore, the tenant for life is entitled to a charge on the inheritance for the sum for which the timber and other wood were sold.

Reg. Lib. A. 1827, fol. 2648.

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[\*427] \*THE ATTORNEY GENERAL v. THE MAYOR AND CORPORATION OF CARLISLE.

1828; 6th November.—*Practice.—Demurrer.*

Leave given to file a general demurrer after the second order for time had been taken out, the subpoena having been made returnable immediately, and there having been no wilful delay on the part of the defendants.

THE defendants, The Mayor and Corporation of Carlisle, and William Nanson, moved for liberty to file a general demurrer to the information and bill, notwithstanding they had obtained an order for time to plead, answer or demur, not demurring alone.

The affidavit made, in support of the motion, by Mr. Donald, the agent for the defendants on whose behalf the motion was made, was to the following effect : that the subpoena, which was made returnable immediately, was issued on the 24th of July, 1828 ; that, on the 28th of that month, an appearance was entered for the defendants, and an office-copy of the bill bespoken, which was sent to the deponent three or four days afterwards : that, on the 4th of August, the deponent sent a close copy of it to the defendant Nanson, who resided at Carlisle, and was the town clerk of that city, and the solicitor to the corporation : that, on the 5th of August, the deponent was under the necessity of setting off for the Northumberland assizes, and, on the same day, the usual

(a) 3 Bing. 807.

(b) 16 Ves. 174.

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1828.—*The Attorney General v. Mayor, &c. of Carlisle.*

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note of attachment for want of an answer, was handed over, by the plaintiffs', to the defendants' clerk in court, and, on the 20th, an attachment and distringas were sealed: that, on the 13th of the same month, the deponent received instructions, from Nanson, to lay the information and bill before counsel, to advise as to the proper defence; which was immediately done: that the counsel \*advised a general demurrer to be filed, and prepared one [\*428] accordingly; but, before it could be filed, the attachment and distringas were sealed: that, on the 21st of the same month, the usual order for time to plead, answer, &c. was obtained, by petition, with the consent of the plaintiffs' agent, and on payment of costs: that, on the expiration of that order, the deponent, with a view to prevent attachments being again issued, obtained a second order for time: that the question in the suit could be properly determined upon the argument of a general demurrer: that the subpoena, if it had not been made returnable immediately, would not have been returnable before the first day of Michaelmas term, 1828, being the day on which this motion was made, but that, the same having been made returnable immediately, it was impossible for the defendants to file their demurrer within eight days from the time of appearance, and that the demurrer would have been filed before the end of August, if the defendants had not been precluded from filing the same by the steps which were necessarily taken in order to prevent the execution of the attachment and distringas.

Mr. *Matthews*, in support of the motion, said that, if the plaintiffs had not obtained, under the new orders, (a) a subpoena returnable immediately, it would not have been returnable until the first day of Michaelmas term; and that then the defendants would have had abundance of time to file a demurrer; but that, under the circumstances of the case, it was impossible for them to do so within the time allowed for that purpose: and that where a strict compliance with the rules \*of the court rendered it impossible for a defendant to [\*429] avail himself of the defence which he was entitled to make, he might make a special application for leave to make that defence.

Mr. *Purvis* opposed the motion, and said that, eight days after appearance, the plaintiffs handed over the usual note of attachment; that, on the 20th of August, an attachment was sealed; and on that occasion the defendants took out the usual order for time; and that they did not take out the second order till three weeks after the first order had expired; that, though the agent was compelled to be absent, his clerk might have acted for him.

The VICE-CHANCELLOR:—I cannot conceive what harm can arise from granting this motion. The appearance was entered four days before it need have been done: and there is nothing, in this case, that can be imputed to the defendants, as wilful delay.

Motion granted on payment of costs.[1]

(a) See the first order.

[1] A defendant cannot put in a demurrer without a special permission of the court, after he has obtained a general order for further time to answer; and if he does file such demurrer, it will be

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 1829.—*Green v. Green.*


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[\*430]

\*GREEN v. GREEN.

1829; 2d March.—*Practice.*

Course of proceeding to compel a defendant to deliver possession of estates to a receiver.

For a report of the previous proceedings taken in this cause, to compel the defendants, John, Thomas, and George Green, to deliver up, to the receiver, the possession of part of the real estates in question in the suit, see ante, page 394.

Mr. *Cooper* now moved that those defendants might be ordered to deliver up possession of the premises in their occupation, to the receiver, within a week after service of the writ of execution of the order to be made on that application.

Mr. *Agar*, and Mr. *Knight*, opposed the motion, and said that the order now sought to be obtained, was unnecessary; because the order of the 14th of March, 1826, had directed the defendants to deliver up possession to the receiver; and that no further step could be taken, until a writ of execution of that order had been served on the defendants.

The VICE-CHANCELLOR:—The course of proceeding to be taken in order to compel a defendant to deliver up possession of lands, is correctly stated, by

Mr. *Dickens*, in his report of *Dove v. Dove*; (a) and it also appears, [\*431] from the form \*of the writ of injunction to deliver possession which is given in that report: (b) first, there must be an order to deliver possession, and then a writ of execution of that order must be served on the defendant; and, until that is done, no further order can be made. I cannot, therefore, make any order upon the present application.

Motion refused, with costs.[1]

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· HARRIS v. HARRISON.

1838: 1st November.—*Practice.—Amendment.*

The 13th order does not apply to a case in which the answer was filed before the first day of Easter term, 1828.

THE answer in this cause was filed in February last. A petition had been lately presented, at the rolls, for an order to amend the bill. The secretary

(a) 2 Dick. 617.

(b) 2 Dick. 621.

ordered off the file for irregularity with costs. Where the defendant wishes for further time to demur, he must obtain a special order from the court for the time to answer, plead or demur. But if through inadvertence he has obtained a general order to answer only, the court may under peculiar circumstances, and upon due notice to the adverse party, give him special permission to put in a demurrer, notwithstanding the general order for time to answer. *Burrall v. Reinsteaux*, 2 Paige, 331. 1 Hoff. Pract. 214.

[1] Vide ante, 406, note.

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1828.—Harris v. Harrison.

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declined to draw up the order, on the ground that the application was not made within the time limited by the thirteenth of the new orders.

Mr. *James* now applied, to the court, that the secretary at the rolls might be directed to draw up an order according to the prayer of the petition. He said that the secretary thought that the time allowed by the thirteenth order, began to run from the first day of Easter term last, under the seventy-eighth order; but that, according to the construction which he put upon the latter order, the former one did not, at all apply in the present case.

\*The Vice-Chancellor said the construction of the seventy-eighth [\*432] order, which Mr. *James* contended for, appeared to him to be right, and directed the order to amend to be drawn up.

END OF PART III.

## CASES IN CHANCERY

BEFORE

## THE VICE-CHANCELLOR.

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[\*433]

\*BARRAUD v. ARCHER.

1828; 20th November. 1829; 5th December—*Vendor and Purchaser.—Compensation.*

An estate, consisting of fen land, and so described in the particular of sale, was charged by a local but public act of parliament with drainage and embanking taxes, of which the purchaser had no express notice.

Held, that he was entitled to a compensation for those taxes.

IN May, 1824, the plaintiffs sold by auction, to the defendant, an estate in the isle of Ely. The particular described it as consisting of fen land, and as being let to John Ingle, as tenant from year to year, at the rent of 165*l.*, and mentioned that the lessor allowed the Eau Brink tax of 13*l.* 12*s.* 8*d.*, and 2*s.* for land tax. The defendant afterwards refused to complete his contract, unless a compensation was made to him in respect of certain embanking and drainage taxes to which the estate was subject under a local but public act of parliament, but which taxes were not mentioned in the particular of sale. The bill was filed to compel a specific performance, without compensation. The defendant in his answer, said that he had never seen the estate, but admitted that he had been informed, before he purchased it, that it was situate in a district liable to some drainage and embanking taxes, and that the annual amount

of them did not exceed 2*s.* 6*d.* per acre; he said that the taxes in [\*434] question were charged, by the act, on the lands on which they \*were respectively imposed, and that any tenant paying the same, was authorized, by the act, to deduct the amount from his rent, as if he had paid the same, to his landlord, in part of his rent, and that, therefore, those taxes were not, in fact, payable by the tenant, but by the landlord; that they might, according to the act, if it should be found necessary, amount to 8*s.* an acre annually, being altogether an annual charge of above 55*l.*; and he submitted whether the particular of sale duly stated such taxes as were paid or allowed by the landlord.

The auctioneer's clerk deposed that, at the auction, previously to the defendant being declared the purchaser, the defendant and the auctioneer entered into a discussion respecting some of the taxes payable in respect of

1828.—Barraud v. Archer.

the estate but not mentioned in the particular, and that the auctioneer referred the defendant to Ingle, the tenant, who was present. The auctioneer deposed that the defendant, before he was declared the purchaser, repeatedly observed to him, the auctioneer, that the drainage and Eau Brink taxes were heavy and varied : to which the auctioneer replied that, whatever taxes the estate was subject to, the tenant paid them, and that the only allowance made to him was what was mentioned in the particular, and this statement was corroborated by the tenant. The same witness further said that, previous to the sale, a conversation took place between different persons then present, (the defendant being one of them,) respecting the embanking and drainage taxes, and that some of those persons observed that the taxes to which the estate was liable, varied. Mr. Ingle deposed that during the auction, a farmer who lived in the neighborhood of \*the estate, [\*435] stated in the presence and hearing of the defendant, that the outgoings upon it were 50*l.*, meaning thereby the Eau Brink, land, and drainage and embanking taxes, which then amounted to 48*l.* per annum. Mr. Ingle further stated that, by the agreement between him and his landlord, he was to pay the embanking and drainage taxes, and his landlord was to pay or allow the Eau Brink and land tax; that it was generally known, throughout the part of the country wheré the estate was situate, that all fen lands were subject to heavy annual taxes, for the drainage and preservation thereof, and that the amount of them was published annually, by notices fixed on the church doors : that the amount of those taxes had been nearly the same for the last twenty or thirty years, and had been paid by the landlord or tenant, according to the agreement between themselves.

Mr. Sugden and Mr. Keene for the plaintiffs :—The particular expressly mentions that the estate is fen land, and enumerates all the taxes which the landlord allowed to the tenant. It is not disputed that this representation was correct. But the defendant says that we have not stated that there are certain other taxes which the tenant pays. Our answer is, that it is not usual to state the taxes which a tenant pays. The question is, whether the representation was fair. It was not mentioned, either in the particular, or at the sale, that there were no other taxes than the Eau Brink and land tax. The estate was sold as fen land ; and therefore the vendors were not bound to mention a single tax. At all events enough was stated to put the defendant on inquiry. The evidence makes \*the matter quite clear. The tenant was present at [\*436] the sale, and the auctioneer referred the defendant to him. If a party buys land which is let to a tenant, he is bound by the terms under which the tenant holds. *Oldfield v. Round*, (a) *Hall v. Smith*, (b) *Daniels v. Davison*. (c)

Mr. Pepys and Mr. Rolfe for the defendant :—The question is, whether such a representation was made, as to the embanking and drainage taxes, as to make it compulsory on the defendant to take the estate subject to those charges. It is very important to observe that the particular is not silent as to

(a) 5 Ves. 508.

(b) 14 Ves. 426.

(c) 16 Ves. 249.

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1828.—Attorney General v. Mayor &c. of Carlisle. Dobinson v. Same.

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the incumbrances to which the estate was subject, but expressly mentions them; and the meaning of the particular is, that the Eau Brink tax and the land tax, were the only incumbrances on the estate. Though the act by which the embanking and drainage taxes are imposed is a public act, so that it is not necessary to plead it specially, yet it could not be the intention of the legislature to fix all persons with notice of its contents. The act created an annual charge upon the land; and a purchaser cannot be deemed to have notice of the charge, merely because the act contains the common clause making it a public act. *Lord Townsend v. Granger*.<sup>(d)</sup> The declarations of the auctioneer are not admissible as evidence with regard to the contract.

The VICE-CHANCELLOR :—In *Lord Townsend v. Granger*, the purchaser was allowed a compensation on the ground that there was \*a specific misrepresentation made by the auctioneer at the sale. Here that doctrine does not apply, as there was no misrepresentation. The act which imposed the embanking and drainage taxes, is a public act. Therefore decree a specific performance of the contract without a compensation.[1]

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THE ATTORNEY GENERAL v. THE MAYOR AND CORPORATION OF CARLISLE.  
DOBINSON v. THE MAYOR AND CORPORATION OF CARLISLE.

1828; 26th November and 5th December.—*Charity*

A grant from the crown, of certain privileges and property, for the defence of and preservation of peace within a city, is a charitable gift: *Semble*.

AN information and bill was filed, in this case, in which certain persons who were residents within the city and liberties of Carlisle were both relators and plaintiffs; and the defendants were the mayor and corporation of that city, together with James Willoughby, who was the clerk to the commissioners under an act of parliament after mentioned, and William Nanson, who was the clerk to the corporation. It stated that, previously to and during the reigns of Henry 2d, Henry 3d, and Edward 1st, the citizens of Carlisle held of the crown, during its pleasure, the city of Carlisle, and two mills in or near the same, and a fishery in the river Eden, in Cumberland, and, also, the toll of the county, together with the liberties, free customs, privileges and appurtenances to the city and other the premises belonging, at a rent of 52*l.* per annum during the reign of King Hen. 2d, and at a rent of 60*l.* per annum during the reigns of King Henry 3d, and King Edw. 1st: that King Edw. 2d, [\*438] being desirous of \*improving the city, and of enabling the citizens to attend to their business in peace and quietness, made to them a grant

(d) Before Sir John Leach, but not reported.

[1] Affirmed, May 9th, 1831. See *Scott v. Hewson*, 1 Sim. 13.

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1828.—Attorney General v. Mayor, &c. of Carlisle. Dobinson v. Same.

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of the city and other the premises, in fee, *upon trust* that they should provide for the peace of the city and its inhabitants ; and that such grant was made by a charter, dated the 12th of May, in the 9th year of Edw. 2d, and which was, partly, as follows : “ Know ye that, for the bettering of our city of Carlisle, and that our citizens of the same city may be able, for the time to come, to apply themselves to their business in the said city under greater tranquillity and in quiet, and may be the more fully animated to fortify and defend that city, if the city itself be specially committed to the custody of themselves, have granted to them, and, by this our charter have confirmed, for us and our heirs, the said city, and our mills of the same city, and our fishery in the water of Eden : to have and to hold, to them and their heirs and successors, citizens of that city, of us and our heirs, at fee farm, together with the liberties, free customs, and all other things to the aforesaid city, mills, and fishery in anywise pertaining, rendering thence, to us and our heirs, yearly, at our feast of St. Michael, eighty pounds for ever : we have also granted to them, and, by this our charter have confirmed, for us and our heirs, our vacant places within the aforesaid city and the suburbs thereof, and that they and their heirs and successors may build those places, or grant them to others, in fee or otherwise, and thence make their profit, at their will, in aid of the aforesaid farm ; and that they and their heirs and successors, citizens of the aforesaid city, may be free of toll, pontage, passage, lastage, wharfage, carriage, murage, pannage, and stallage of their business and merchandizes, through all our kingdom.” \*The information and bill further stated that the citizens con- [\*439] tinued in the enjoyment of the premises, *upon trust as aforesaid*, until the 23d year of Edward the 3d, when they were interrupted in the enjoyment of some part thereof, by the sheriff of Cumberland ; and that, thereupon an inquisition as to the same was held ; and that Edw. the 3d, in the 26th year of his reign, made a charter of confirmation to the citizens, by which it was recited that the citizens of Carlisle had had, and been used to have, the several rights, privileges and immunities therein enumerated, some of which were the full return of all writs, a market and a fair, and trial of felonies ; and also to hold pleas of the crown, and chattels of felons and fugitives ; and also common of pasture, and turbary on the king's moor ; and that they ought to be quit, through all the kingdom, of toll, pontage, passage, &c. ; and that the citizens had a certain place to the city annexed, called the Battail Holme, which served for the market and fairs, and that they had had the aforesaid liberties and quietances from time to which memory did not exist, in aid of the citizens of the city, and of the farm of the same ; and that they had the mill of the city, and the fishery of the king in the water of Eden, toll inward and outward, and the small farms of the city as parcels of the farm of the city ; and that the citizens had had all the liberties and profits aforesaid from time to which memory was not : and his majesty then granted unto the citizens, their heirs and successors, all the premises, rights, liberties, free customs and privileges mentioned in the inquisition. The information and bill next stated that, at the times the



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1828.—Attorney General v. Mayor, &c. of Carlisle. Dobinson v. Same.

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[\*440] grants were made, and previously thereto, \*the kings of England, for the military defence of the city from the Scotch, kept a strong garrison in the castle, and that the express object of the charters, and of the kings in granting the same, was *upon trust* that the citizens might, out of the property and revenue contained in the grants, keep peace, not merely within the city, but also within the liberties, and might also thereout assist the garrison in resisting any external attack which the Scotch, or other enemies of the king, might make on them: that the citizens accordingly accepted the grants *upon the said trusts*, and, in pursuance thereof, maintained and kept a mayor and two bailiffs, and certain other officers; and that, in further pursuance of their *said trust*, the citizens provided and kept up both a prison and a lock-up house; and that such mayor, bailiffs, and other officers were paid for their services, and the prison and lock-up house were provided and kept up, out of the property and revenues contained in the grants: that, from the time of the grants until the time after mentioned, no peace officer whatsoever, saving the peace officers of the citizens so paid as aforesaid, ever existed within the city or liberties: that Charles the 1st, in the 13th year of his reign, in compliance with a petition presented to him by the citizens, confirmed the before mentioned grants; and that the charter of confirmation, after reciting that the mayor and citizens had besought his majesty to confirm the former grants, and also to grant anew some other things, for the better governing and advantage of the city, proceeded thus: "Now know ye, that we, graciously assenting to the said petition, and willing to provide for the bettering of the aforesaid

[\*441] city, and \*that there may be had, in the same city, one certain and undoubted order and measure for the keeping of our peace, and the good rule and government of the people therein, and that the aforesaid city, henceforward, may be and remain a city of peace and quietness, and that our peace and other acts of justice may be preserved therein, and hoping that, if the mayor and citizens of the said city, and their successors, should enjoy, from our grant, more ample donations, liberties and privileges, then they may feel themselves more forcibly enjoined and obliged to those services which they may be able to render and to show forth to us, our heirs and successors:" that the charter then incorporated the citizens under the style of "the mayor, aldermen, bailiffs and citizens of the city of Carlisle," and empowered them to make laws for the good rule and governance of the city, and of the officers and the residents within the same, and for setting forth how they should demean themselves for the public good, and good rule of the city, and other matters concerning the same. The information and bill then stated that the corporation, in pursuance of the said charters and the said trusts, maintained and paid, out of the revenues arising from the rights, privileges and property comprised in the charters, certain bailiffs, beadles and other officers for the purpose of keeping peace within the city and liberties, and kept up the lock-up house, and a prison for debtors and persons convicted at the sessions for the city; and that, from the granting of the charter of incorporation until after the

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1828.—Attorney General v. Mayor, &c. of Carlisle. Dobinson v. Same.

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passing of the act of parliament after mentioned, no person residing within the city or liberties, ever paid, or was called upon to pay, any sum of money towards the \*support or maintenance of any officer employed [\*442] in keeping the peace of the city and liberties, or in administering justice therein, the corporation being bound, by the charters and the trusts therein mentioned, to provide a sufficient number of officers for such purposes, and to pay for the same out of the said property and revenues : that since the year 1823, the corporation had dismissed some of the peace officers, converted the lock-up house into shops, and pulled down the prison : that the corporation having thus neglected its trust, and given up all care for the maintenance of the peace of the city and liberties, it became necessary to apply for an act of parliament for the keeping of peace within the city and liberties ; when it was proposed that the corporation should contribute 300*l.* a year for that purpose ; but that they refused to accede to that proposal, and denied that they were liable, by reason of the charters, or any trust therein contained, to contribute to the expense ; and, parliament being unable to try the question as to the liability of the corporation, an act was past in the 7th and 8th years of Geo. 4th, for watching, regulating and improving the city of Carlisle, and the suburbs thereof by which certain commissioners were appointed for carrying the act into execution, who were, amongst other things, required to appoint watchmen and beadles, and to raise money to defray the expenses of obtaining the act, and carrying it into execution, and, for that purpose, to make rates on the occupiers of houses and other buildings within the city and suburbs ; but it was provided that the act should not extend to release the corporation from any expense of protecting the peace of the city, nor to prevent any person from proceeding against them for \*the non-performance of any duty which, by law, charter, custom or prescription, they were bound to perform, or for the non-application of their revenues for the purposes for which, by charter, custom, prescription or usage, such revenues ought to be applied : that the commissioners had proceeded to carry the act into execution, and appointed beadles or watchmen, and levied rates for their payment, and that, since the passing of the act, the corporation had not maintained any peace officer, or paid any thing towards the maintenance of the police establishment under the act : that the whole of the revenues of the corporation arising from the rights, liberties, free customs, privileges and properties, comprised in the charters, were applicable, after satisfying the ordinary expenses of the corporation, and ought to be applied in keeping peace within the city and liberties : that the said rights, &c. having been given to the citizens, in the first instance, and afterwards, to the corporation, coupled with the trust of providing for the due order, peace and security of persons and property being within the city and liberties, the corporation had, nevertheless, in breach of such trust, applied such part of its revenues arising from the said rights, &c. as ought to have been applied in keeping the said peace of the city, to their own purposes : that, besides the charters before-mentioned, the different kings of England granted, by various other charters,

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1828.—Attorney General v. Mayor, &c. of Carlisle. Dobinson v. Same.

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various other rights, liberties, free customs, privileges and property besides those before-mentioned, to the citizens, and that such other rights, &c. were vested in the corporation for the purposes before mentioned; and that such other charters were in the possession or power of the corporation, or [\*444] its clerk: that the commissioners \*under the act of parliament, claimed an interest in such parts of the revenues of the corporation as were applicable to the keeping of the peace of the city and liberties; and that, by the act, the commissioners were to sue and be sued in the name of their clerk. The information and bill prayed for an account of the revenues of the corporation which had, since the passing of the act of parliament, or since such other time as the court should think proper, been produced by the said rights, liberties, free customs, privileges and property, and also of all sums of money which, during the same period, were of right payable, and had been paid, out of such revenues; and that the surplus of such revenues, after such payments, might be ascertained, and be declared applicable to the keeping of the peace of the city and liberties under the act of parliament, and that such surplus might be applied accordingly, and be paid to the commissioners for that purpose.

The mayor and corporation and Nanson, their clerk, put in a general demurrer to the information and bill.

Mr. *Horne*, Mr. *Matthews* and Mr. *Tinney* in support of the demurrer:—The grants were made, to the corporation, for civil, and not for eleemosynary purposes, and there is no instance of a court of equity interfering to compel a civil corporation to perform its duties. The proper mode of proceeding in such a case is by mandamus in the court of king's bench. (a) *The King v.*

*Barker*. (b) Although the word "trust" is frequently used in the [\*445] \*information, the term is misapplied, as no trust was created by the charters. The purposes to which the revenues of the corporation were to be applied, were not specific but general, and the corporation were empowered, by the charters, to dispose of the property as their own, and, therefore, the court would not enforce the performance of the trust, if any existed. *The Attorney General v. The Corporation of Carmarthen*. (c) *The Mayor and Commonalty of Colchester v. Lowten*. (d) Was the court ever known to refer it to the master to settle a scheme as to the mode in which the revenues of a civil corporation were to be applied? Would it not be impossible to devise any such scheme, owing to the purposes, for which the revenues of a civil corporation are to be applied, being so various, and fluctuating from day to day?

The information asks that the surplus of the revenues beyond what has been applied for ordinary corporate purposes, may be paid over to the commissioners. How is this court to exercise a judgment as to what are proper corporate purposes, and what are not? Besides, the corporation may say that,

(a) 1 Black. Comment. 481. (b) 3 Burr. 1265. (c) Coop. C. C. 30. (d) 1 V. & B. 226.

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1898.—Attorney General v. Mayor, &c. of Carlisle. Dobinson v. Same.

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though they have not applied the surplus, yet they have corporate purposes to which they intend to apply it.

The act of parliament expressly says that the rights of the corporation are not to be prejudiced by any of its enactments, and, therefore, leaves the corporation exactly in the state in which they were before the passing of the act. Now the information seeks to divest them of the privileges conferred by the \*charters. Its object is, not to compel the corporation to ap- [\*446] point proper officers for keeping the peace, but to pay a portion of their funds to certain other persons called commissioners of police, in order that they may apply it for the purpose of supporting and maintaining officers appointed by themselves and not by the corporation, and over whom the corporation can have no control. If this were done, it would be a direct violation of the charters, and of the act of parliament. The commissioners have nothing to do with the funds of the corporation. In *The Attorney-General v. Heelis*,(e) the court entertained jurisdiction, because a fund was given for specific trust purposes, and the commissioners and trustees had no power to apply it to any purposes except those pointed out by the act. Here the funds are given, to the corporation, for general purposes. Then there is the case of *The Attorney-General v. Brown*,(f) in which the rates that were to be levied were to be applied for a specific object; and the only question that arose in that case was, whether that object was such a charitable use as would authorize the attorney general to interfere with it by information. The decision in *The Attorney-General v. Gort*,(g) proceeded on the same principle. Besides that case differs from the present; because some of the members of the corporation had possessed themselves of the funds to the exclusion of the rest, who had, in some measure, a right to have a control over the funds, and to have an account of them.

This is an information and bill, and the plaintiffs are the same persons as the relators; but it does not \*appear that they have any in- [\*447] terest in the subject of the suit which entitles them to appear as plaintiffs.

Mr. Sugden, Mr. Bickersteth, and Mr. Purvis, in support of the information and bill:—The information and bill sets out certain grants made, to the corporation, for specific services to be performed by them, by way of trust, and alleges that they did, in execution of the trust, actually perform the obligations thus imposed upon them; and the confirmations were made upon that ground. We do not mean to deny that there was a benefit intended to the corporation, beyond the purposes which were the main objects that the grantors had in view. Our proposition is, that an obligation was created of a nature to be enforced, in this court, by way of trust. We state that, by the charters, a trust was created: but, if there was any doubt as to the construction of those instruments, the usage which we allege to have existed, in ancient and all

(e) 2 Sim. & Stu. 67.

(f) 1 Swanst. 265.

(g) 6 Dow. P. C. 136.

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1828.—Attorney General v. Mayor, &c. of Carlisle. Dobinson v. Same.

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succeeding times, might be called in aid to give a construction to them. All the cases show that, if there is a general obligation to be performed by a corporation, which is the nature of a charitable use, this court will give relief. *The Attorney General v. Brown.*(h) *The Attorney General v. Heelis.*(i) *The Attorney General v. Gort* ;(k) and *The Attorney General v. The Corporation of Dublin.*(l) This last case is directly in point.

The purposes for which these were made are clearly charitable uses within the statute.(m) The act of parliament does not at all prejudice the [\*448] right of \*compelling the corporation to contribute to the rates which it directs to be levied. The legislature thought that great consideration was due to our claim, and therefore expressly saved it.

Then we allege that, besides the charters beforementioned, the different kings of England granted, by various other charters, various other rights, &c. besides those before mentioned, to the citizens of Carlisle, and that such other rights, &c. are now vested, in the corporation, for the purposes before mentioned; and that such other charters are now in the custody of the corporation or its clerk. Notwithstanding these allegations a demurrer is put in, by which the defendants admit that they have other property which, at all events, is bound by these trusts; and that they have, in their custody, documents which will show that there were such trusts imposed upon the property as this court will enforce.

The Vice-Chancellor said, in the course of the argument, that the two last clauses in the act of parliament left the question just where it was before.

5th December:—On this day, his Honor delivered judgment as follows:—In this case it does not appear to me that it is very necessary to go much at length into the general question, independently of any particular expressions that are to be found in the information itself.

I should observe that my Lord Redesdale, in giving his judgment in the case of *The Attorney General v. The Corporation of Dublin.*(n) [\*449] says: “there is, on this \*subject a writ, in the register, which recites that the king had been given to understand that his predecessors had granted certain rates on all merchandize brought into a town, to be applied to the walling of the town; and the inhabitants having complained that the rates collected had not been duly applied, the writ proceeds in the nature of a commission for taking the account. Under such circumstances an information, at this moment, would lie at the suit of the attorney general, for taking such account. The practice of proceeding by information rather than by the writ of account, has prevailed in consequence of the difficulty of proceeding under the writ” And then, he says,(o) “we are referred to the statute of Elizabeth with respect to charitable uses, as creating a new law upon the subject of charitable uses. That statute only created a new jurisdiction. It created no

(h) Ubi sup.

(i) Ubi sup.

(k) Ubi sup.

(l) 1 Bligh, new series, 312.

(m) 43 Eliz. chap. 4, and see Duke's Char. Uses, 130. 132.

(n) 1 Bligh, new series, 337.

(o) See page 347.

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1828.—Attorney General v. Mayor, &c. of Carlisle. Dobinson v. Same.

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new law : it created a new and ancillary jurisdiction ; a jurisdiction borrowed from the elements which I have mentioned ; a jurisdiction created by a commission to be issued out of the court of chancery." And Lord Eldon, in giving his judgment, plainly seemed to think that, where there was any fund created for the purpose of being applied to some public purpose, a court of equity had, by its original jurisdiction, a right to see to the application of the fund, although the application of it might not happen to be one of the purposes mentioned in the statute of charitable uses. And his lordship takes notice of his own judgment in the case of *The Attorney General v. Brown*, and modestly says, that his judgment in that case is, in some measure, weakened by what the Vice-Chancellor(p) said in \*the case of *The Attorney* [\*450] *General v. Hee*'s. It certainly appears, as we collect from his expressions, that he does not altogether coincide with what was said, by the Vice-Chancellor, in that case ; but still it has not been overruled. The Vice-Chancellor, in that case, says.(q) " I am of opinion that funds derived from the gift of the crown, or from the gift of the legislature, or from private gift, for paving, lighting, cleansing and improving a town, are within the equity of the statute of Elizabeth, charitable funds to be administered by this court."

Now, in the present case, although one might pause before one said that, without doubt, according to the construction of the first charter which is stated, the corporation were obliged to apply the whole of their revenues arising from the gift, to public purposes, (because there are, certainly, words very strongly indicative of the intention of the grantor that they should have them for their own use,) yet the court cannot lose sight of the usage that has prevailed. Now it is clear, from the statement in the bill and information, that a usage has prevailed of applying the revenues which the corporation of Carlisle had, to public purposes ; and, therefore, if it rested on the mere general law, independent of any general expressions, I think it would not be very easy to sustain the demurrer.

But it appears to me that all doubt is entirely removed by the mode in which the general charge is introduced into the information ; for it states that, although the corporation was bound, by its charters, \*to have main- [\*451] tained, out of its revenues, such part of the police establishment as is necessary to provide for the due order, peace and security of the persons and property being within the city and liberties, yet the corporation contend that they are not bound to pay any thing : and there afterwards follows this charge : " that, besides the charters hereinbefore mentioned, their majesties. the different kings of England, granted, by various other charters, various other rights, liberties, free customs, privileges and property, besides those hereinbefore mentioned, to the said citizens of the said city, and that such other rights, liberties, free customs, privileges and property, are now vested in the said corporation, for the purposes hereinbefore mentioned," that is, all the purposes before men-

(p) Sir John Leach.

(q) 2 Sim. & Stu. 77.

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1829.—MacGregor v. East India Company.

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tioned ; and it appears to me, therefore, that there being this general charge, independent of the general doctrine, this demurrer must be overruled.(r)

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[\*452]

\*MACGREGOR v. THE EAST INDIA COMPANY.

1828; 3d November. 1829; 28th January.—*Pleading.—Statute of limitations.*

The statute of limitations, notwithstanding it is a defence at law, may be pleaded to a bill of discovery in aid of an action brought, provided it has been pleaded to the declaration.

If the action was commenced before the bill was filed, the plea must aver that the cause of action did not accrue within six years before the action was brought.

A plea of the statute of limitations need not deny the usual allegation that the defendants have books, &c. in their custody, unless it is alleged that those books, &c. would show that a promise had been made within six years.

THE plaintiff was the executor of the late Sir John MacGregor Murray, and the defendants were The East India Company, and William Astell, one of the directors, and Joseph Dart, the secretary to the directors. In 1785, Sir John MacGregor Murray was sent by Sir John Macpherson, the then Governor General of India, on a secret mission, to the upper Provinces of Bengal, in order to obtain information as to the designs of the native princes, under a promise from Sir John Macpherson that he should be reimbursed his expenses out of the funds of the company. In 1822, Sir John MacGregor Murray died, without having been repaid his expenses : and in Trinity term, 1824, the plaintiff commenced an action of assumpsit against the company for the recovery of them. The defendants pleaded the general issue, and also the statute of limitations. In Michaelmas term of the same year the bill in this cause was filed, for a discovery and a commission to examine witnesses in India, in aid of the action. The bill alleged that many applications were made, to the company, by Sir John MacGregor Murray, in his life-time, at various intervals and periods, for payment of his expenses ; that the company admitted the justice of his claim ; and that promises and assurances were, from time to time, made, by the authority of the company, or the directors, or their secretary, that the claim should be ultimately satisfied ; and that the defendants had, in their custody or power, divers books, accounts, &c. relating to the matters aforesaid,

[\*453] and, by \*which, if produced, the several matters aforesaid, or some of them, did, or would appear. The defendants put in, to the bill, three separate pleas of the statute of limitations, in which they stated that they had pleaded several pleas to the action, and, amongst others, the general issue, but did not mention, expressly, that they had pleaded the statute, to the action.

The pleas to the bill were argued, before Sir John Leach, V. C., on the 9th of November, 1825, when his Honor was of opinion that they were bad, as it did not appear, upon the record, that the defendants had pleaded any plea to the action, which would preclude the plaintiff from going into the merits of his case

(r) This decision was affirmed by the Lord Chancellor on the 4th of June, 1830.

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 1829.—*MacGregor v. East India Company.*


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and availing himself of the discovery sought by the bill. Leave, however, was given to amend the pleas. The amended pleas came on for argument, on the 19th of April, 1826, before the same learned judge, when it was objected that they averred that the cause of action (if any) arose above six years before the filing of the bill, whereas they ought to have averred that it arose above six years before the commencement of the action, which was prior to the filing of the bill. His Honor allowed the objection, but again gave the defendants leave to amend their pleas, which was accordingly done. The pleas so secondly amended, after stating the date and title of the statute of limitations, and the bringing of the action for the same purposes respecting which the discovery was sought, and setting forth the pleas to the declaration, alleged that, if the plaintiff, either in his own right, or as the executor of the testator, ever had any cause of action, against the defendants, for the matters contained in the bill, the same accrued above six years before the \*commencement of [\*454] the action; and that the defendants did not, by themselves, or any other person, at any time within six years before the commencement of the action, or from the commencement of the last mentioned period of six years down to the filing of the bill, or down to the time when the defendants were served with process to appear to and answer the bill, promise or agree to come to any account for, or to pay or any otherwise satisfy the testator, in his lifetime, or the plaintiff, since his death, any money for any of the matters alleged in the bill. On these pleas coming on for argument: *Mr. Sugden* and *Mr. Roupell*, for the plaintiff, contended that they must be overruled because the defendants had, neither by their pleas, nor by answers in support of them, denied the allegation as to their having in their custody the books and other documents mentioned in the bill, the contents of which might prevent the statute of limitations from being a bar to the action.

The VICE-CHANCELLOR:—The question is, whether the mere general allegation that has been referred to, is to be taken as an averment that there were in the possession of the defendants documents which would overrule their plea, and show that there has been a promise within six years: because otherwise the possession of these documents is quite immaterial. Now, upon the authority of a case (a) which was very much considered by my predecessor, the present Master of the Rolls, \*I think that unless that allegation went [\*455] further, and averred that, by these documents, or some of them, if produced, it would appear that a promise had been given within six years, the mere allegation that the defendants had in their possession papers relating to the matters aforesaid, or some of them, do or would appear, is immaterial, there not being, as I recollect, any charge in the bill that there has been a promise made within six years, which promise is evidenced by any writing whatever; and, consequently, it appears to me that it was not necessary for the defendants to negative this general allegation, either by averments in their pleas, or by answers in support of their pleas.

(a) *Qu. James v. Sadgrove*, 1 Sim. & Stu. 4. [*Memoranda*, post, 570.]



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 1828.—Walton v. Johnson.
 

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Mr. *Sugden* and Mr. *Roupell* then contended that the statute of limitations could not be pleaded to a bill for discovery in aid of an action at law, because that statute was a defence at law, and the plaintiff was entitled to the discovery in order to enable him to defeat the defence at law : that giving the discovery could do no harm, because, if there was no legal right to action, the discovery would be of no use. *Hindman v. Taylor* ;(b) *Leigh v. Leigh* ;(c) *Mitf. Plead.* 218, 219.

Mr. *Horne* and Mr. *Wyatt*, for the defendants, cited *Sutton v. Lord Scarborough*.(d)

The VICE-CHANCELLOR :—The counsel for the plaintiff, grounding [\*456] themselves upon Lord Thurlow's opinion, in *Hindman v. Taylor*, \*have argued that the plea of the statute of limitations cannot be used in a case like the present : but *Hindman v. Taylor* is no authority for that. That case only shows that, if an action is brought, and a bill of discovery is filed, and certain matters are pleaded, which, if discovered would amount to a bar to the action at law, the plea of those matters cannot be used as a bar to a bill of discovery. But I do not find that Lord Redesdale has laid it down, or that it is laid down anywhere, that the plea of the statute of limitations shall not be used as a bar to a bill of discovery : and I cannot, therefore, think that what appears to have been Lord Thurlow's opinion in *Hindman v. Taylor*, can be considered a sufficient ground for me to say that I shall overrule this plea because it is a plea of the statute of limitations.[1]

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WALTON V. JOHNSON.      HESLTON V. JOHNSON.

1828 ; 15th December.—Costs.—Injunction.—Solicitor.

Injunction granted to restrain an action, for the amount of a solicitor's bill, which, had been taxed after the commencement of the action, and more than one-sixth had been taken off, but the costs of taxation had not been ascertained.

WILLIAM JACKSON, one of the defendants, had employed Robert Henry Anderson, as his solicitor and attorney in the above causes and in other suits and matters of business. Anderson had delivered his bill to Jackson, and, on its not being paid, commenced an action for the amount. Jackson then obtained an order, referring the bill to one of the masters, for taxation. The bill was taxed accordingly ; and the usual certificate was obtained, on the 11th August, 1828, by which it appeared that more than one-sixth of the amount had been taken off. The costs of the taxation had not been ascertained, owing, [\*457] as it was alleged, to \*the master's office having been closed for the

(b) 2 Bro. C. C. 7.

(c) Ante, 1 Vol. 349.

(d) 9 Ves. 71.

[1] As to a plea of the statute of limitations, see *Foley v. Hill*, 3 Myl. & Cr. 475. *Jermy v. Best*, 1 Sim. 373. *Forbes v. Skelton*, 8 Sim. 335. *Goodrich v. Pendleton*, 3 John. Ch. Rep 390

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 1828.—*Bramston v. Carter.*


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long vacation. On the 10th October, 1828, Jackson was held to bail in the action.

Mr. *Knight*, for the defendant Jackson, now moved that the bail bond might be delivered up, and all proceedings in the action stayed. He said that he admitted that the action was maintainable at law; but that, after this court had assumed jurisdiction as to the costs, and made an order for their taxation, which, of course, contained a submission, on the part of the defendant, to pay the bill when taxed, which might be enforced by process of contempt, this court would not allow the action to be proceeded in. *In re Dillon*; (a) *Ex parte Bellott*. (b)

Mr. *Sugden*, contra:—The action was commenced before the order for taxation was obtained. It is clear that the bill included business done in the courts of law as well as in this court. It has been decided in K. B. that an attorney and solicitor has a right to bring an action for his bill, although the order for taxation is actually being proceeded on.

The VICE-CHANCELLOR:—What the court of king's bench may do, does not bind this court. I am bound by the decision in *ex parte Bellott*, and must make a similar order. [1]

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 \*BRAMSTON v. CARTER.

[\*458]

1828; 19th December.—*Practice*.—*Dismissal*.

Amendment of a bill, without serving a subpoena, to answer the amendments, will not prevent the defendant from dismissing the bill.

THE answer was filed on the 24th of April, 1828. On the 24th of July following, the plaintiff obtained an order to amend his bill; and afterwards amended it accordingly, but did not serve the defendant with a subpoena to answer the amendments.

Mr. *Seton*, for the defendant, now moved to dismiss the bill for want of prosecution. He cited *Cooke v. Davies*. (c)

Mr. *Pitman*, for the plaintiff, cited *Kendall v. Beckett*. (d)

The VICE-CHANCELLOR:—In *Kendall v. Beckett*, the Lord Chancellor was of opinion that the defendants, by delivering, to the plaintiff, their office copy of the bill, for the purpose of its being amended, had waived their right to dismiss the bill. That circumstance is not to be found in the present case: and, inasmuch as no subpoena to answer the amendments was served, the amending of the bill was not such a proceeding as would take away the defendant's right, under the 16th of the new orders, to dismiss the bill.

(a) 2 Scho. & Lef. 110.

(b) 4 Mad. 379.

(c) 1 Tarn. & Russ. 309; S. C. 1 Russ. 153, in note.

(d) 1 Russ. 152.

[1] Vide *De Rose v. Fay*, 3 Edw. V. C. Rep. 369.

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 1828.—Wright v. Tatham.
 

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[\*459]

\*WRIGHT V. TATHAM.

1828; 19th December.—*Practice*.—*Bill to perpetuate testimony*.

A motion to dismiss a bill to perpetuate testimony for want of prosecution, is irregular. The proper application is, that the plaintiff may proceed within a given time, or may pay the defendant his costs.

THE bill was filed to perpetuate the testimony of witnesses to a will. The defendant's answer had been put in, and replication had been filed, but no witnesses had been examined.

Mr. *Duckworth*, for the defendant, now moved to dismiss the bill for want of prosecution. He cited, *Anon.*(a)

Mr. *Walker*, for the plaintiff, said that it was contrary to the practice of the court to dismiss a bill to perpetuate testimony, under any circumstances; but that the defendant ought to move for his costs as soon as the witnesses were examined: that the case cited would be a sufficient answer to the application, for, here, replication had been filed.

Mr. *Duckworth*, in reply, said that the defendant could not, in this case, move for his costs; as there had been no examination of witnesses.

The Vice-Chancellor said that it appeared to him that the motion was wrong in point of form,(b) and refused it with costs.

[\*461]

\*WILLIAMS V. DAVIES.

1829; 16th January.—*Injunction*.—*Judgment*.—*Set-off*.

Motion refused to dissolve an injunction, granted on affidavit and certificate, to restrain execution on a judgment obtained by the defendant against the plaintiff, the latter having obtained a judgment to a greater amount against the former.

THE bill stated that the defendant Davies had, for about ten years, rented of the plaintiff an inn at Carmarthen, at the rent of 50*l.* per annum: that Davies

(a) Amb. 237.

(b) It appears, from the following note of a case, for which the reporter is indebted to Mr.

Turner, that the application which the defendant ought to have made, in the abovecase,

[\*460] is \*that the plaintiff might be ordered to proceed with his cause within a given time, or might pay the defendant his costs.

BARRAM V. LONGMAN.

May 20, 1825.—Bill to perpetuate testimony filed Michaelmas term, 1818. Two witnesses examined, *de bene esse*, same term. Answers filed Michaelmas term, 1819. Replication filed, Hilary term, 1822. Order to rejoin, 13th December, 1823. Subpœna to rejoin served 15th January, 1824. Defendants had not examined any witnesses.

Mr. *Turner* moved, in their behalf, that the plaintiff might be ordered to proceed to the examination of his witnesses as prayed by his bill, and procure such examination to be completed on or before the last day of Trinity term, or, in default thereof, that he might be ordered to pay to the defendants their costs of suit, to be taxed by one of the masters.[1] There was no affidavit in support of the motion. The plaintiff did not appear. Sir John Leach, V. C. made the order upon affidavit of service.

[1] A similar order was made, on the authority of the above cases, on a bill for a commission to examine witnesses abroad, in aid of an action at law; *Parr v. Howlin, Sausse & Scully*, 124.

1829.—Williams v. Davies.

had given, to the plaintiff, promissory notes to the amount of 850*l.*, for the furniture and stock in the inn, and had also purchased, of the plaintiff, considerable quantities of malt : that, in 1827, the plaintiff brought an action, against Davies, in the court of great sessions for Carmarthen, upon the promissory notes remaining unpaid, and obtained judgment for 600*l.* and 5*l.* 3*s.* 3*d.* costs, and issued execution thereon, to which a return of *nulla bona* was made : that, in August, 1827, the plaintiff distrained upon Davies for arrears of rent, and, in Trinity term, 1828, Davies brought an action, in K. B., against the plaintiff, and also against the sheriff and his officers, alleging that the distress had been illegally made : that, there having been some irregularity in the proceedings, the defendants in the action allowed judgment to go by default, and, by an order of one of the judges of K. B., the venue in that action (which had been changed) was brought back to the county of the borough of Carmarthen, and Davies was to be at liberty to execute the writ of inquiry at Hereford, he undertaking to pay the extra costs of the witnesses on both sides, which the defendants in the action were to be at liberty to deduct : that the damages in this action were assessed at 600*l.* : that the plaintiff, Williams, had agreed to indemnify the sheriff and his officers (who also were \*defendants in [\*462] this suit) against the damages and costs in that action : that Williams had applied, to the K. B., to allow him to set off the 605*l.* 3*s.* 3*d.* against the damages and costs in Davies' action, subject to the lien of Rogers, Davies' attorney, (who also was a defendant in this suit,) but that the K. B. refused the application, on the ground that Davies had made an affidavit that there were other accounts between him and Williams, but that, in fact, Davies was very largely indebted to Williams, on balance of accounts : that Davies was proceeding to tax the costs in his action, and to enter up final judgment therein, and that he intended, immediately upon obtaining it, (which he would be able to do in a few days,) to issue execution in his action : that Davies was in insolvent circumstances, and that Williams was unable to obtain payment of any part of his demand, except by setting off the same against the damages and costs recovered by Davies. The bill then contained an offer, from the plaintiff, to satisfy Roger's lien, and prayed that the 605*l.* 3*s.* 3*d.*, and the other sums due from Davies to the plaintiff, or that the 605*l.* 3*s.* 3*d.* alone, might be set off against the damages and costs recovered by Davies : that Davies might be decreed to acknowledge satisfaction of his judgment ; that the necessary accounts might be taken ; and that Davies might be restrained from suing out execution upon his judgment. On the 6th of December, 1828, the Vice-Chancellor, upon affidavit of merits, and certificate of bill filed, granted an injunction in terms of the prayer.

Davies, before putting in his answer, moved to dissolve the injunction.

\*Mr. *Horne* and Mr. *Hayter*, in support of the motion :—An injunction [463] to stay proceedings at law cannot be granted upon certificate and affidavit, except in the case of a warrant of attorney, or in cases of fraud, or where it is impossible to obtain the common injunction in time. *Franklyn v.*

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 1829.—Brown v. Moore.
 

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*Thomas, (a) Rowe v. Wood, (b) Turner v. Wright, (c) Hine v. Fiddes. (d)* The plaintiff cannot bring himself within the principle of any of the exceptions to the rule. He might have obtained the common injunction, or have given the defendant notice of his application. These were counter judgments, and the court of king's bench refused to set off one against the other.

Mr. Sugden and Mr Jacob appeared to oppose the motion.

But the Vice-Chancellor, without hearing them, said that it appeared to him that the case was the same as if the defendant's judgment had been paid, and he had been proceeding, at law, to take the plaintiff in equity, in execution : that the judgment was, in point of fact, satisfied ; and that although the court of king's bench would not, in point of form, allow the plaintiff's judgment to be set off against the defendant's, yet that it was right that it should be done in this court.

Motion refused, without costs.[1]

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 [\*464]

\*BROWN V. MOORE.

1829 ; 16th January.—*Practice.—Dismissal of bill.*

On the 28th of November plaintiffs filed a replication, and on the 29th, a subpoena to rejoin, returnable immediately, tested on the 27th, but without obtaining an order for it. Afterwards the defendants obtained an order to dismiss. Held, that the subpoena was irregular, and a motion to discharge the order of dismissal, was refused.

THE plaintiffs filed a replication on the 28th of November, 1827 : on the 29th they served a subpoena to rejoin, returnable immediately. This subpoena was tested on the 27th ; and it appeared that it had been issued without any order having been obtained for a subpoena returnable immediately. The plaintiffs' clerk in court did not give notice, to the defendants' clerk in court, of the replication having been filed, until a few hours after the service of the subpoena to rejoin. The defendants, a week afterwards, obtained an order to

(a) 3 Mer. 225. (b) 2 Swanst. 234, in note. (c) 1 J. & W. 290. (d) 2 Sim. & Stu. 370.

[1] Equitable set-off exists in cases where the party seeking the benefit of it can show some equitable ground for being protected against his adversary's demand ; the mere existence of cross demands is not sufficient ; still less will the court interfere on the ground of equitable set-off to prevent a party from recovering a sum awarded to him by a jury as damages for a breach of contract, merely because there is an unsettled account pending between him and the party against whom the action is brought, although the subject matter of the account consist of dealings and transactions arising out of the contract the breach of which is the subject of the action. *Rawson v. Samuel*, 1 Cr. & Ph. 172 ; where the above case of *Williams v. Davies*, is somewhat questioned. Equitable set-off is where by reason of the nature of the cross demand there can be no set-off at law. *White v. O'Brien*, 1 Sim. & Stu. 551. Where there are cross demands between two parties of such a nature that if both were recoverable at law, they would be the subject of legal set-off, then if either of the demands is matter of equitable jurisdiction, the set-off will be enforced in equity. *Clark v. Cort*, 1 Cr. & Ph. 155. See further, *Simpson v. Hart*, 14 Johns. Rep 63.

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1829.—*Lewis v. Bridgman.*

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dismiss the bill for want of prosecution, as of course, under the 17th of the new orders.

Mr. *Rose*, for the plaintiffs, moved to discharge this order, and contended that it was obtained upon a false allegation, the allegation being that the plaintiffs had not served any subpoena, and also that the subpoena and service were regular; and, if not, that it was still a compliance with the order; and that the notice of filing replication was not necessary, being only matter of courtesy.

Mr. *Jacob*, contra, contended that notice of filing the replication was necessary; that under the 17th order, it was necessary that a subpoena, effective for the purposes of the cause, should be duly served; that the subpoena ought not to have issued till after replication, or without obtaining and serving an order for it, and \*that an irregular subpoena was to be treat- [\*465] ed as a nullity. *Powell v. Martin.*(a)

The VICE-CHANCELLOR:—The question is, whether a subpoena has been served within the meaning of the 17th order.[1] Here the replication was filed on the 28th. The subpoena issued on the 27th, and there was no order for it. A subpoena so served is not a subpoena within the order.

Motion refused with costs.[2]

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LEWIS V. BRIDGMAN.

1829; 17th January.—*Practice.—Revivor.*

To prevent a suit from being revived, either a plea or demurrer must be put into the bill of revivor; an answer insisting that the plaintiff has no right to revive is not sufficient.

A DEFENDANT, in his answer to a bill of revivor, objected to the plaintiff's right to revive the suit. The plaintiff, however, obtained an order to revive, as of course. The order was in the usual form, and recited that the defendant had put in his answer, and thereby submitted to the suit being revived against him. The defendant then moved to discharge the order, as containing a false allegation.

The Vice-Chancellor said that the allegation was not a false one, as the putting in of the answer was submitting to the revivor; and that, if the defendant wished to prevent the revivor, he could not do it except by filing either a plea or a demurrer.(b)

Mr. *Kindersley* in support of the motion.

Mr. *Spence* opposed it.

(a) 1 J. & W. 292.

(b) See *Harris v. Pollard*, 3 P. W. 348, and Mitf. 61. [*Codrington v. Houlditch*, 5 Sim 286. *Devaynes v. Morris*, 1 Myl. & Cr. 213.]

[1] Amended in 1831. Orders of the court of chancery, 1 Russ. & M. 771.

[2] *Crooks v. Tvery*, 3 Myl. & Cr. 168. *White v. Smith*, 1 Keen, 381.

1829.—*Farmer v. Curtis.*

[\*466]

\*FARMER v. CURTIS.

1829 ; 27th January and 22d June.—*Pleading.—Parties.—Foreclosure.*

The mortgagor is a necessary party to a bill by a second mortgagee to redeem the first mortgage, and foreclose the equity of redemption.

THE bill was filed, by a second mortgagee, to redeem the first mortgage, and foreclose the equity of redemption ; but the heir of the mortgagor (who was dead) was not made a party to the suit. The bill alleged that the plaintiffs had made diligent inquiry after the residence of the heir of the mortgagor, but were unable to discover where he resided, or whether he was living. On the cause coming on to be heard, a preliminary objection was taken, because the mortgagor's heir was not a party to the suit.

Mr. Turner, for the defendants, in support of the objection cited *Fell v. Brown*, (a) and *Palk v. Clinton*, (b) and said that the consequence of making a decree in this suit, would be that the defendants might have a new bill filed against them, on the heir coming within the jurisdiction of the court.

Mr. Sugden, for the plaintiffs :—The case of *Palk v. Clinton* has nothing to do with the present question. For, in that case, two estates were included in the mortgage, and the relief prayed related to one of them only. *Fell v. Brown* is the only case that applies : and there Lord Thurlow threw out merely some observations, without deciding the matter. My own impression is, that decrees have been made in the absence of the person entitled to

[\*467] \*the equity of redemption. But supposing that no such decrees have been made, yet as the case has never been decided in the other way, I must call on the court to make a decree. If the court will not sustain a bill, by a second incumbrancer, to redeem the first, the first, though a bare trustee, would hold against the persons for whom he is a trustee : for, subject to the mortgage, the first mortgagee is a trustee for the second mortgagee. If a decree is made, the inconvenience falls on the plaintiff, who undertakes to submit to it. For it may be held that the mortgagor may have a right to take the account against the plaintiff ; but he cannot have a right to take it against any other person. Supposing a mortgagor to be an insolvent person, he might be easily prevailed on to go abroad, in order to enable the first mortgagee to hold the estate. *Fell v. Brown* is no decision. It was only thrown out that the party was expected to return soon, and the cause was ordered to stand over.[1]

(a) 2 Bro. C. C. 276.

(b) 12 Ves. 48, see pp. 53, 58.

[1] Where the person whose interests are sought to be affected by the decree, is out of the jurisdiction of the court at the institution of the suit, it cannot proceed in his absence ; *Browne v. Blount*, 2 Russ. & M. 83. *Stratton v. Davidson*, 1 Russ. & M. 484. But the rule has not been always adhered to in the case of the appointment of a receiver. *Tanfield v. Irvine*, 2 Russ. 149. *Holmes v. Bell*, 2 Beav. 298. See vide, *Coward v. Chadwick*, 2 Russ. 150, note. *Stratton v. Davidson*, 2 Russ. & M. 484. The statutes of New York have made provision for proceeding against a person absent from the state or concealed therein ; 1 Hoff. Prac. 190.

1829.—King v. Tullock.

Mr. Turner, in reply :—The rule may be inconvenient or absurd, and may require the interference of the legislature ; but the settled doctrines of the court are not to be overturned on a mere allegation that the rule may be inconvenient. In *Fell v. Brown*, Lord Thurlow expressly refused to proceed until the heir came within the jurisdiction of the court. Sir William Grant says : “ in *Fell v. Brown*, that is laid down as Lord Thurlow’s understanding of the practice,” &c.(c) Now it has been said that the first mortgagee may keep the estate : \*does not that argument apply to the second mortga- [\*468] gee also ? He too may keep the estate, and get it without any thing being due to him. For, in the absence of the mortgagor, the court does not decide whether any thing is due to him, or not.

The Vice-Chancellor said that the point was of great importance, and that he would consider of it.

Mr. Sugden then mentioned the case of the *Bishop of Winchester v. Beauvor*,(d) as having some bearing on the question.

Mr. Pepys, Mr. James, and Mr. Ching, were also counsel in the cause.

22d June.—On this day, the Vice-Chancellor ordered that the cause should stand over, for want of parties, and that the plaintiffs should pay, to the defendants, the costs of the day.(e) [1]

## \*KING v. TULLOCK.

[\*469]

1829 ; 4th February.—*Bankrupt.—Supplemental bill.*

The defendant in his answer to a bill filed by the assignees of a bankrupt, alleged that the plaintiffs had not obtained the necessary consent to the institution of the suit ; upon which the plaintiffs filed a supplemental bill, stating that, since the filing of the original bill, they had obtained the necessary consent : demurrer to the supplemental bill allowed.

THIS suit was instituted, by the plaintiffs, as assignees of a bankrupt. The defendant, in his answer, denied that the plaintiffs had been duly authorized to commence the suit.(f) The plaintiffs then filed a supplemental bill, stating

(c) See 12 Ves. 58, 59.

(d) 3 Ves. 314.

(e) See *Ross v. Page*, post. 471.

(f) See 6 Geo. 4, c. 16, s. 88.

[1] A second mortgagee may file a bill for a foreclosure and sale to pay off all the incumbrances according to their respective priorities, or to redeem as respects prior mortgages, and then to sell in order to pay the redemption money, as well as to satisfy the subsequent incumbrances. *Norton v. Warner*, 3 Edw. V. C. Rep. 106. *The Western Insurance Co. v. The Eagle Fire Insurance Co.* 1 Paige, 284. If the prior mortgage should not be due, the junior mortgagee will be entitled to a decree for the sale of the mortgaged premises, subject to such prior mortgage. *The Western, &c. v. The Eagle, &c.*, ubi supra. So far as mere legal rights are concerned, upon a bill of foreclosure, the only proper parties to the suit are the mortgagor and mortgagee, and those who have acquired rights or interests under them subsequent to the mortgage : and the mortgagee has no right to make one who claims adversely to the title of the mortgagor, and prior to the mortgage, a party defendant, for the purpose of trying the validity of his adverse claim of title in this court. *Eagle Fire Company v. Lent*, 6 Paige, 635. S. C. 1 Edw. V. C. Rep. 301.



1829.—King v. Tullock.

that, in consequence of the defence so made by the answer, they had called a meeting of the creditors; and that, a sufficient number not attending, they obtained the consent of the commissioners to the institution of the suit; and praying that they might have the benefit of the suit, and be declared to be entitled to prosecute it. The defendant demurred, generally, to the supplemental bill.

Mr. Sugden and Mr. Jacob, in support of the demurrer, said that a supplemental bill could not be used to carry on a suit which had been originally wrongfully instituted: that the office of a supplemental bill was, to remedy some defect in the original bill, and not to supply the title to file the original bill. *Ocklestone v. Benson*, (b) *Bozon v. Williams*, (c) *Adams v. Dowding*. (d)

Mr. Wray, in support of the bill, said that it was a universal principle of law that, whenever a subsequent consent is given, it authorizes the previous act, *ab initio*. *Humphreys v. Humphreys*, (e) *Brown v. Higden*, (f) *Jones v. Jones*. (g) There is nothing in the 6 Geo. 4, c. 16, that makes it imperative that the consent shall be obtained previously to the commencement of the suit.

But the consent, when obtained, operates retrospectively.

[\*470] \*The VICE-CHANCELLOR:—The question is, whether the reason assigned by the Vice-Chancellor, in *Ocklestone v. Benson*, is not sufficient. The words of the statute are abundantly plain. After stating what things may be done, it says: "And no suit in equity shall be commenced, by the assignees, without such consent as aforesaid."

If *Ocklestone v. Benson* is rightly decided, the only question to be considered is, whether the act of the commissioners can be considered as, *ab initio*, authorizing the suit. The statute, after having declared that no suit shall be instituted without the consent of the creditors, provides that, if one-third in value of the creditors shall not attend at the meeting, the assignees shall have power, with the consent of the commissioners, testified in writing under their hands, to do any of the matters aforesaid. Now, one of the matters aforesaid is the commencement of a suit; and, therefore, the sanction of the commissioners is substituted for the consent of the creditors. Now, in the case that I have referred to, it was decided that, without the prescribed consent, the assignees had no right to maintain the suit. My opinion therefore is that, in compliance with the provisions of this statute, the demurrer must be allowed. (h)

(b) 2 Sim. & Stu. 265.

(c) 2 Young & Jervis, 475.

(d) 2 Madd. 53.

(e) 3 P. W. 349.

(f) 1 Atk. 291.

(g) 3 Atk. 110 and 218.

(h) In *Jones v. Yates*, (in Exch. 22d June, 1829,) [reported, 2 Young & Jer. 373; see *Memoranda*, post, 570,] the bill was demurred to, because the consent required, by the 88th sect. of the new bankrupt act, to the institution of the suit, had not been obtained. The Lord C. B. overruled the demurrer, stating that he had consulted with the M. R. and the Vice-Chancellor, and that if those learned judges continued of the same opinion as they then entertained, his decision would be followed by them in similar cases. See memorandum prefixed to 2d Young & Jervis' Reports. [The case of *Jones v. Yates* is confirmed by subsequent decisions, consequently the case in the text is overruled. *Piercy v. Roberts*, 1 Myl. & K. 4, *Casborne v. Barham*, 6 Sim. 289.]

1829.—*Rose v. Page.*\**ROSE v. PAGE.*

[\*471]

1829; 4th and 9th February.—*Pleading.—Parties.*

▲ second mortgagee may file a bill of foreclosure against the mortgagor and third mortgagee without making the first mortgagee a party.

THIS was a bill of foreclosure filed, by a second mortgagee, against the mortgagor and the third mortgagee, in whose deed the prior mortgages were recited. The defendants demurred, because the first mortgagee was not a party.

Mr. *Spence* in support of the demurrer:—The inconvenience arising from not making all the mortgagees parties to a bill of foreclosure, is that there may be as many suits, less one, as there are mortgagees, by which the security of a subsequent mortgagee will be diminished. This suit will not enable the third mortgagee to obtain his money by redeeming the second; but, if the first mortgagee had been a party, he might, in this suit, have obtained either his money or the estate. If such bills were permitted, some authority for them would be found in the books; but none such can be produced.

Mr. *Sugden* and Mr. *Loftus Lowndes* for the bill:—There is no reason for preventing a second mortgagee from asserting his rights against the persons who come in under him. The case is different where a first mortgagee omits to make the second mortgagee a party to the suit; for, by so doing, he gives the right of redemption to the third mortgagee. There is no authority against the practice that we are supporting, and convenience is with it.

\*After the argument was concluded, the Vice-Chancellor said that [\*472] his opinion was against the demurrer, but that he would consider the point.

9th Feb.—The VICE-CHANCELLOR:—The bill, in this case, is filed, by a second mortgagee, against the mortgagor and the third mortgagee, praying for an account and payment of what is due to the plaintiff, or for a foreclosure. The defendants have demurred to it, because the first mortgagee is not made a party: and the question is, whether it is necessary that he should be a party. It was admitted, in the argument, that there is no authority upon the subject. Convenience requires that such a bill should be supported. All the subsequent incumbrancers have taken subject to the first mortgage; and therefore they dealt on the footing that there were securities on the equity of redemption.

I have not been able to find any authority upon the subject, but from a manuscript note of the late Sir Samuel Romilly, it appears to have been his opinion, that, to a bill, by incumbrancers upon an estate, to have the estate sold, it was not necessary to make annuitants, having prior charges, parties: and, as far as my own experience goes, I remember having prepared such bills, and no objection was taken to them.

Demurrer overruled.(a)

(a) See *Farmer v. Curtis*, ante, 466, [468, note.]

1829.—MacMahon v. Upton.

[\*473]

\*MACMAHON v. UPTON.

1829; 4th February.—*Joint stock company.—Pleading.—Parties.*

An act of parliament for forming a joint stock company authorized all suits on behalf of the company, against any person, to be commenced in the name of the chairman; and, in all proceedings in which it would have been before necessary to state the names of the partners, it was made sufficient to state the name of the chairman only: held, that the act did not authorize suits to be commenced, by the chairman, against one of the partners without making the others parties.

THE plaintiff was the chairman of a joint stock company, called The Royal Irish Mining Company. The defendant was one of the members of that company. The bill stated an act of the 6th Geo. 4., by which certain persons were empowered to work mines in Ireland, and do other acts connected therewith, for which purposes they were to be a joint stock company, by the name and description before mentioned; and all actions and suits to be commenced, or on behalf of the company, against any person or persons, body or bodies politic or corporate, were to be commenced and prosecuted in the name of the chairman, or of one of the directors of the company, as the nominal plaintiff, for and on behalf of the company; and, in all proceedings in which, before the passing of the act, it would have been necessary to state the names of the persons composing the company, it was made sufficient, after the passing of the act, to state the name of such chairman or director, whose death or resignation was not to be an abatement of the suit. The bill then stated that, there being 241 shares of the joint stock of the company remaining on hand, the board of directors transmitted the certificates of those shares to the defendant, *who was and is a member of the company*, with directions to sell them, on account of the board of directors, and for the benefit of the company, the board being willing to allow the defendant the usual commission in respect of his agency: that the defendant, accordingly, sold the shares for a considerable [\*474] \*premium, which was received by him, on account of the board of directors, and for the use of the company; but that he had refused to account for and pay to the directors the proceeds of the sale. The bill prayed for an account of the moneys received, by the defendant, in respect of the shares, and for payment of the amount, after deducting the defendant's commission.

The defendant demurred to the bill, because the other members of the company were not parties to the suit.

Mr. Rose and Mr. Knight, in support of the demurrer, said that the clause, in the act, which authorized suits to be commenced in the name of the chairman or one of the directors, related to suits between the company and third persons, and did not extend to disputes between the company and one of its own members. *Van Sandau v. Moore.*(a) In that case Lord Eldon says: "If the members of these bodies happened to quarrel amongst themselves," &c.

(a) 1 Russ. 441, 460.

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 1829.—*Manchester College v. Isherwood.*


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Mr. *Campbell*, in support of the bill :—The clause that has been referred to applies directly to the case of the plaintiff : it is in the most general terms, and extends to all actions and suits whatsoever. *Davis v. Fish.*(b) This case is not between the company and one of its members, but between the company and its agent.

\*Mr. *Rose*, in reply :—The bill alleges that the defendant is a mem- [\*475] ber of the company, and that the shares were put into his hands on account of the company of which he is a member ; and it, throughout treats the defendant as being a member of the company.

The VICE-CHANCELLOR :—It is quite obvious that it was the intention of the legislature, by the act which constitutes this society, to authorize actions or suits to be commenced, in the name of the chairman or of one of the directors, against third parties only, and not to enable the society to sue one of its own body without making the other members parties. It appears to me, remembering what Lord Eldon has said, and what has been done by the legislature, that this is not a case so protected as to render it unnecessary to make the other members parties to the suit.(c)

Demurrer allowed.

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\*THE WARDEN AND FELLOWS OF MANCHESTER COLLEGE v. ISHER- [\*476] WOOD.

1829 ; 6th and 10th February.—*Consolidation of suits.*

Motion by defendants in tithes suits, in all of which the same defence was made, that the suits might be consolidated, refused.

The plaintiffs had filed sixteen bills for tithes of the parish of Manchester, against different persons, amounting, altogether, to one hundred and sixty-three in number. All the defendants made the same defence and set up seven moduses. The causes being at issue, a motion was made by the defendants, that the causes might be consolidated, or that the first mentioned cause only might be prosecuted to a hearing, and that proceedings in the other causes might be stayed, the defendants in them undertaking to be bound by the decree in the first cause ; or that it might be referred to the master to inquire whether the said causes, or some and which of them might not be consolidated, and that, in the meantime, all further proceedings in the said causes might be stayed.

Mr. *Sugden* and Mr. *Duckworth*, in support of the motion :—It may be collected, from the judgment of Lord Eldon, C., in *Keighley v. Brown*,(d) that, where the answers are filed, and there is, as in this case, only one defence, the court will consolidate the suits. Here each answer is in the same terms ; seven moduses are set up in each of them, and each of those moduses will be proved

(b) *Gow on Partnership*, 30 and 99 ; *Cary on Partnership*, 83 ; and *Farren on Life Assurance*, 128.

(c) See *Long v. Yonge*, ante, 369.

(d) 16 Ves. 344, 1 *Fowler's Excheq. Pract.* 214.

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1829.—*Manchester College v. Isherwood.*


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by the same evidence. At all events the plaintiffs will be put to no inconvenience, if decrees are made in all the suits, but the evidence is [\*477] taken in \*one of them only, and made binding upon all the defendants.

Mr. *Agar* and Mr. *Parker*, for the plaintiffs, opposed the motion on the ground of the inconvenience that would arise from abatements happening from time to time, if the suits were consolidated. They cited *Forman v. Blake*.(b)

The VICE-CHANCELLOR :—In this case several bills have been filed, by the plaintiffs, against several occupiers of land, claiming an account of tithes in kind ; and a motion has been made, on the part of the defendants, that the several suits may be consolidated. In the different suits answers have been filed.

The general rule is, that every plaintiff shall be at liberty to conduct each suit that he institutes, in what way he thinks best. At law there is one exception ; in the case of actions upon policies of assurance : and the question is, whether, in courts of equity, any such exception has been allowed. In the case of *Pyke v. Brock*,(c) in the year 1791, a motion was made to consolidate seven tithe suits. In that case C. B. Eyre speaks of the practice as if it were common ; but the reason assigned for making the order, was that no cause was shown. In *Keighley v. Brown*,(d) in 1809, a motion was made, before answer, to consolidate tithe suits. Lord Eldon is represented as stating his opinion that the court of exchequer did, very freely, consolidate cases of this description ; but it appears that he mentioned the point to Baron [\*478] Thompson, \*who had no idea that the order was of course, in the court of exchequer, though, sometimes, made under special circumstances ; and Lord Eldon refused to make any order. In 1819, in the case of *Forman v. Blake*,(e) a motion was made, after answer, to consolidate tithe causes. The Chief Baron Richards said : “ I never heard of an order, in the course of my experience, for consolidating causes in equity, nor can I conceive upon what principle it can be done. There are many reasons why it should not : and, if it be the practice, it is extraordinary.” And, upon referring to the registrar, he said there was a case wherein a similar application had been made, about twenty-four years ago, in about 1795, when the court refused the application.

In 1820, in *Foreman v. Southwood*,(f) a motion was made to consolidate tithe suits, before answer ; and that was refused : and it is stated,(g) that a similar application had been made, in the case of *Davies v. Moseley*, in May of the same year, and refused with costs. These are all the cases in print. But in a manuscript case of *Kynaston v. Perry*, before Lord Eldon, in February and March, 1826, a motion was made to consolidate tithe suits before answer, and refused. It is evident, therefore, that, neither in this court, nor in

(b) 7 Price, 654.

(e) 7 Price, 654.

(c) 3 Gwilll. 1345.

(f) 8 Price, 572.

(d) 16 Vca. 344.

(g) See page 575.

1828.—*Lear v. Leggett.*

the court of exchequer, has the practice prevailed of compelling the plaintiff to consolidate his different suits, against several defendants; and the present motion, being a mere experiment in opposition to practice, must be refused with costs.[1]

## \*LEAR V. LEGGETT.

[\*479]

1829; 7th February.—*Construction.—Bankrupt.—Alienation.—Forfeiture.*

Testator declared trusts of stock for A. for life, and, after his decease, for his children, and declared that the provision he had made for A. should not be subject to any alienation or disposition by him, but if he should alienate, or attempt to alienate, it should operate as a forfeiture of the provision, and the same should devolve on the person next entitled.

A. who had several children, became bankrupt. Held, that his assignees were entitled to his life interest.

ALEXANDER GOUDGE, by his will, gave to his wife, Sarah Goudge, and to Jacob Cope, and the plaintiff, Jeremiah Lear, 23.333*l.* 6*s.* 8*d.* three per cent. consols, upon trust to pay to his wife, the dividends thereof, for her life, and, after her decease, upon trust to pay the dividends thereof unto and amongst his son and daughters, Alexander Goudge, Elizabeth, the wife of Joseph Batho, and Sarah, the wife of James Ebenezer Saunders, in equal shares, for their respective lives; and after the decease of his son and daughters respectively, he directed that one third part of the bank annuities should be in trust for, and should be paid and transferred unto and amongst all and every the child and children, *per stirpes* and not *per capita*, of each and every his said son and daughters, who should live to attain the age of twenty-one years, equally to be divided among such children: and until the respective shares of such children should become payable, he directed that his trustees should, from and after the several deceases of his wife and the parents of such child or children, receive the dividends of such child's share, and apply the same for his or her maintenance and education, until his, her or their share should become vested and payable.

The will then contained the following proviso: "Provided always, nevertheless, and my mind and will is that the several provisions hereinbefore and hereinafter given for my son and daughters during their \*respective [\*480] lives, shall not, nor shall any part thereof respectively, be subject to

[1] Where there were two separate mortgages on the same property, belonging to different mortgagees, and the holder of the first mortgage filed a bill of foreclosure against the second mortgagee and the owners of the mortgaged premises, and the same solicitor filed another bill, on behalf of the second mortgagee, against the first mortgagee and the owners of the premises, to foreclose the second mortgage, it was held that only one bill of foreclosure was necessary; that the owners of the equity of redemption were to be charged with the costs of one suit only; and the solicitor for the complainant might elect in which suit he would take a decree; *Wendell v. Wendell*, 3 Paige, 509.

1829.—*Lear v. Leggett.*

any alienation or disposition, by sale, mortgage, or otherwise, in any manner whatsoever, or by anticipation of the receipt : and, in case they, or any or either of them shall charge, or attempt to charge, affect, or incumber the same, or any part or parts thereof respectively, then I do declare it to be my express will and meaning that any such mortgage, sale, or other disposition or incumbrance so to be made by them, or either or any of them, on his, her or their life annuity, interest or provision, shall operate as a complete forfeiture thereof, and of all benefit therein, during the remainder of their respective natural lives, and the same shall devolve upon the next successor, or person or persons in expectancy, as if he, she, or they were then actually dead." The testator appointed his widow and Jacob Cope, and the plaintiff, his executors. The testator died about the year 1806. The widow, Sarah Goudge, died in 1821 ; Alexander Goudge, the son, was then of age ; and, on the fifth of March, 1828, a commission of bankrupt issued against him, under which he was found a bankrupt ; and the defendants, Leggett, Peache and Birkett were chosen his assignees. Alexander Goudge, the son, had eight infant children, who were also defendants.

The bill was filed by the trustees of the stock. The question raised by it was, whether the assignees were entitled to the third part of the dividends of the stock, during the remainder of the life of Alexander Goudge, the son, or whether upon his bankruptcy, his children became entitled to his share of the stock, in possession.

[\*491] \*Mr. Koe, for the plaintiffs.

Mr. Sugden, for the assignees:—The question in cases of this nature is, whether the act upon which the devolution of interest is to take place, is to be done by the party, or whether he is to be passive, or may be passive. *The King v. Robinson.*(a) That was a case in which an annuity provided for the personal support of the testator's son, was given over on his doing any act to charge or alienate it ; and the Chief Baron held that a positive act must be done by the annuitant, and that a seizure of the annuity, under his outlawry, did not fall within the words of the will so as to create a forfeiture. It may be useful to state that, in the judgment in that case, the marginal note in *Dommett v. Bedford*(b) is said to be entirely incorrect. Now bankruptcy is an alienation, not by the voluntary act of the legatee, but by operation of law. It has been determined that there is a distinction between insolvency and bankruptcy, because, in the former case, the party makes the assignment, and it is by his own voluntary act that he has the benefit of the insolvent act. *Shee v. Hale*,(c) *Wilkinson v. Wilkinson*.(d) But the becoming bankrupt is compulsory. It is clear law that no forfeiture can take place, except by an act which is strictly within the clause creating the forfeiture. Thus, in cases of estates tail, where it was declared that the estates should go

(a) Wightwick's Rep. 386.

(c) 13 Ves. 404.

(b) 6 T. R. 684.

(d) Coop. 359, and 3 Swanst. 515.

1821.—*Lear v. Leggett.*

over, as if the tenant in tail were dead, no effect was given to the proviso, because the estate would not go over unless the tenant in tail died without issue, and the court would not add a word to the proviso. Now \*has [\*482] this annuitant charged or attempted, within the words of the proviso in this will, to charge, affect, or incumber his annuity. He has been merely passive; and the law has transferred his property to the assignees.

Mr. *Horne* and Mr. *Knight*, for the children of Alexander Goudge, the son:—The law does not compel any person to commit an act of bankruptcy; therefore, bankruptcy is a voluntary act. In *Dommett v. Bedford* (e) the term was alienation only, here the expressions are much stronger; and, if *Dommett v. Bedford* stands on any principle, the same principle applies to the present case with much greater force. There the alienation was to cause a forfeiture, which is always construed strictly, here it gives effect, merely, to a limitation over. In *Cooper v. Wyatt* (f) the words of the proviso were not so large as they are in the present case, and yet it was held that the interest of the son did not pass to his assignees, on his becoming bankrupt; but that his children became entitled. The event which the testator meant to provide against was, an alienation of the annuity, under any circumstances, whereby it would become no longer applicable to the personal support of the son and his family.

The VICE-CHANCELLOR:—This is not a case in which I can hold, on the words of this proviso, that the limitation over took effect; and it appears to me that the cases, which have been cited in support of the children's claim, do not warrant the argument in their favor.

\*The words of this will must, as in all cases of the like nature, be [\*483] construed with great strictness. In *Dommett v. Bedford*, the annuity on which the question arose, was given by reference to the annuity given to the niece. There the testator gave the annuity to his niece, Ann Ireland, and declared that the same should, from time to time, be paid to herself only, and that a receipt under her hand, and no other, should be a sufficient discharge for the payment thereof; his intent being that the said annuity, or any part thereof, should not be alienated for the whole term of her life, or for any part of the said term; and that, if the same should be so alienated, the said annuity should immediately, thereupon, cease and determine. The testator does not say that, if the annuity was alienated by the act of the party, it should cease; therefore, that is not a case in which the benefit was to go over on an act done by the party. The case of *Cooper v. Wyatt* is totally different from the one now before me. The Vice-Chancellor, in giving judgment, calls in aid of his construction of the proviso, the mode in which the benefit is given to the nephew, and says: "Here is no gift to the nephew other than a direction that the payment should be made into his proper hands, but not to his assigns, and for his own use and benefit; which expressions naturally import an intention of personal enjoyment by the nephew, and the exclusion of all who attempt to claim

(e) 6 T. R. 624, and 2 Ves. jun. 149.

(f) 5 Madd. 482.



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 1829.—*Morse v. Morse*.
 

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through him ; and, in this sense, the word 'his assigns,' will as well comprehend the assignees by operation of law, as the assignees by his own act." The judgment, therefore, did not rest on the proviso alone, but on the proviso taken in connection with the limited words of the gift. [His honor here read [\*484] that part of the will in this case in \*which the trusts were declared, and then proceeded.] Now here is a gift totally unlike the gifts in *Dommett v. Bedford*, and *Cooper v. Wyatt*. The testator then directs that the gift shall not be subject to any alienation, or disposition by sale, mortgage, or otherwise, in any manner whatsoever. Now these words alone do not create any forfeiture. The testator then declares that, in case his son or daughters should charge, or attempt to charge, affect, or incumber, &c. Now all these words refer to a voluntary act of the party, and point at a voluntary alienation ; and I am of opinion that no act has been done, in this case, which can be said to be a voluntary alienation or attempt to alienate ; and I must, therefore, declare that the assignees are entitled to the life-interest of Alexander Goudge, the son, in the fund in question.(g)[1]

[\*485]

## \*MORSE V. MORSE.

1829 ; 11th February.—*Will.—Construction*.

Testator gave to his daughter and her children 5000*l.*, 3000*l.* to be paid in one year after his decease, and 2000*l.* after the decease of his wife, and appointed A. B. trustee of those sums for his daughter and her children. The court declared the 5000*l.* to be in trust for the daughter for life, and after her decease for all her children, whether born in the testator's life-time or after his decease.

SIDAY HAWES made his will, dated the 20th of March, 1827, and, after making certain specific bequests, and giving an annuity to his wife, proceeded as follows : "I give and bequeath unto my daughter, Anne Morse and her children, for their sole use and benefit, 5000*l.* ; 3000*l.* thereof to be paid within one year after my decease, and the other 2000*l.* within one year after the

(g) See *Brandon v. Robinson*, 1 Rose, 197 ; S. C. 18 Ves. 429 ; 1 Swanst. 431, n. ; *Graves v. Dolphin*, 1 Sim. 68.

[1] Affirmed, 1 Russ. & M. 690. Acc. *Whitfield v. Prickett*, 2 Keen, 608. A testator bequeathed the dividends of certain stock to his nephew, solely for the maintenance of himself and family, declaring that such dividends should not be capable of being charged with his debts or engagements, and that he should have no power to charge, assign, anticipate or incumber them ; but that if he should attempt so to do, or if the dividends, by bankruptcy, insolvency or otherwise should be assigned or become payable to any other person, or be or become applicable to any other purpose than for the maintenance of the nephew and his family, his interest therein should cease, and the stock be held upon trusts for his children : long subsequently to the date of the will, and a few weeks prior to a codicil confirming it, he took the benefit of an insolvent act, and some years afterward the testator died ; it was held that this insolvency was a forfeiture of the life interest of the legatee. *Yarnold v. Moorhouse*, 1 Russ. & M. 364, and see *Lewis v. Lewis*, 6 Sim. 304.

1829.—*Morse v. Morse.*

decease of my wife ; and I do appoint Mr. John Courage, and my sons Siday Hawes and Robert Hawes, trustees, for the said sums of money, for my daughter Anne Morse and her children. I devise and bequeath, unto my daughter Elizabeth Hawes, and her heirs, 7000*l.* ; 5000*l.* thereof to be paid within one year after my decease, with 5*l.* per cent. interest from my decease upon the said 5000*l.*, and the other 2000*l.* to be paid within one year after the decease of my wife, Elizabeth Hawes. I devise and bequeath, unto my daughter Susan Courage and her children, for their sole use and benefit, 6000*l.* ; 4000*l.* thereof to be paid within one year after my decease, and the remaining 2000*l.* to be paid within one year after the decease of my wife ; and I do appoint Mr. John Morse, and my sons Siday Hawes and Robert Hawes, trustees, for my daughter Susan Courage, and her children, for the said sum of 6000*l.*” The testator died on the 6th October, 1827, and left surviving him his widow, and his daughters Anne Morse and Susan Courage, and nine children of Anne Morse, all infants, and two children of Susan

\*Courage who were also infants. On the 19th of July, 1828, another [\*486] child was born to Anne Morse. The bill was filed by the trustees and executors of the will, against Mrs. Morse and Mrs. Courage and their children, in order to obtain the opinion of the court upon the bequests to those parties.

The bill prayed that the rights and interests of the defendants to the legacy of 5000*l.*, bequeathed for the benefit of Anne Morse and her children ; and to the legacy of 6000*l.*, bequeathed to Susan Courage and her children, might be declared by the court.

Ann Morse, by her answer, claimed to be entitled, for life, to the interest of the whole of the legacy of 5000*l.*, given unto or in trust for her and her children, namely to the interest of 3000*l.*, part of that sum, from the end of one year after the decease of the testator, and to the interest of 2000*l.*, the remainder, from the decease of the testator’s widow. Susan Courage made a like claim, in her answer, as to the legacy of 6000*l.*

The children of Mrs. Morse, born in the testator’s life-time, and the two children of Mrs. Courage, claimed, by their answers, to be entitled, equally, as tenants in common with their mothers, to absolute vested interests in the 5000*l.* and 6000*l.* respectively.

The child of Mrs. Morse born after the testator’s death, claimed the same interest, under the will, as his brothers and sisters should, in the opinion of the court be entitled to.

\*Mr. Teed, for the plaintiffs.

[\*487]

Mr Knight. for the defendants Mrs. Morse and Mrs. Courage.

Mr. R. D. Thompson, for the child of Mrs. Morse which was born after the testator’s decease.

Mr. Milford, for the other defendants, cited *Cooper v. Thornton.*(a)

The VICE-CHANCELLOR :—It is clear that the testator did not intend an im-

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 1829.—*Pickering v. Hanson.*


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mediate payment of the two legacies ; and there would be an inconsistency with respect to them if the mothers did not take life interests, for then different classes of children would become interested in the two portions of the legacies. I must therefore put such a construction upon the bequests as will make all the children participators. Declare the legacy of 5,000*l.* to be in trust for Mrs. Morse for her life, and after her decease for all her children ; and the legacy of 6,000*l.* to be in trust for Mrs. Courage and her children, in like manner.[1]

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[\*488]

\*PICKERING *v.* HANSON.1829 : 12th February, and 2d March.—*Practice.—Amendment.*

Leave given to amend a bill without prejudice to an injunction obtained on the filing of the bill.

In this case an injunction had been obtained upon certificate of bill filed, and affidavit of merits, and the answer had been put in.

Mr. *Lovat* now moved for leave to amend the bill without prejudice to the injunction ; and cited *Pratt v. Archer*.(a)

Mr. *Lofthus Lowndes*, for the defendant, cited *Penfold v. Stoveld*.(b)

The Vice-Chancellor said that he would inquire into the practice.

2d March.—On this day his Honor said that it was the clear opinion of the registrar that, when an injunction had been obtained on affidavit of merits, the plaintiff might amend his bill without prejudice to the injunction.

Motion granted.[2]

(a) 1 Sim & Stu. 433. The report of this case is erroneous in stating that the common injunction had been obtained. The fact is, that the injunction that was granted, in that case, was to stay waste, upon certificate of bill filed and affidavit of merits. The profession, however, cannot be misled by the error, as the Vice-Chancellor, in his judgment, states what the practice of the court is as to amendment, both in the case of a special and of a common injunction.

(b) 3 Madd. 471.

[1] A testator bequeathed three slaves and one thousand dollars, to trustees and directed the profits of the slaves, and the interest of the money to be applied to the maintenance and support of his daughter and her child ; and on the death of his daughter the slaves and moneys to be given to her child or children ; it was held that she was entitled to the whole profits during her life, and the child had no right to demand a share of them for her support and maintenance. *Wallace v. Dold's executors*, 3 Leigh's (Virginia) Rep. 258.

[2] Vide *Grant v. Grant*, ante 14. *Horne v. Watson*, ante 85, 86, note. *Davis v. Davis*, post, 517. *Renwick v. Wilson*, 6 Johns. Ch. Rep. 81. 1 Hoff. Pract. 301. In applying to amend a sworn bill by adding allegations and charges, the amended matter should be annexed to the petition, and the truth of such matter should be sworn to, besides having the usual jurat upon the petition ; otherwise the injunction will fall upon making the amendments. *Rogers v. De Forest*, 3 Edw. Ch. Rep. 171.

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1829.—Tomlinson v. Lymer

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\*TOMLINSON v. LYMER.

[\*489]

1829; 12th February, and 2d March.—*Production of documents.*

A plaintiff in a tithe suit is not entitled to a production of receipts for moduses and compositions, given to the defendants by the plaintiff and his predecessors, some of those receipts relating to tithes not sued for, and the others being evidence for the defendants, and not for the plaintiff.

THIS was a suit for tithes of hay, milk, calves and agistment. The defendants, in their answers, admitted that they had in their custody several receipts for moduses and compositions given to them by the plaintiff and his predecessors, but submitted that they ought not to be compelled to produce them, inasmuch as some of the receipts were given for compositions for tithes of corn (which were not claimed by the bill.) and the others were evidence for the defendants, and not for the plaintiff.

Mr. Rolfe, for the plaintiff, now moved that the defendants might be ordered to produce the receipts. He said that it was material to the plaintiff to inspect them, as it might appear, from them, that the alleged moduses had varied, or that some of the titheable articles which were stated to be covered by the moduses, were not, in fact included in them. He cited *Erans v. Richards*,<sup>(a)</sup> *Corbett v. Hawkins*.<sup>(b)</sup>

Mr. Spence, for the defendants, said that the plaintiff could not be entitled to have the receipts in question produced, as they were the defendants' evidence, and because they were given by the plaintiff, and therefore could not be admitted as evidence for him. He referred to *Bligh v. Berson*,<sup>(c)</sup> and *Firkins v. Lowe*.<sup>(d)</sup>

\*THE VICE-CHANCELLOR:—As to those receipts which were given [\*490] for compositions for tithes of corn, the plaintiff can have no right to see them, as they relate to matters not in dispute: and, as to those that do relate to the matters in dispute, on the authority of *Bligh v. Berson*, and *Firkins v. Lowe*, I shall make no order.

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STONE v. MAULE

1829; 27th February.—*Will.—Construction.*

Bequest to H. D. for his own use, and in case he should die in the testator's life-time, or afterwards without having any child or children, then over. H. D. survived the testator, and died without having had a child: held, that the gift over took effect.

A TESTATOR bequeathed the residue of his personal estate to H. Dodderidge, for his own use and benefit: and, in case, H. Dodderidge should happen, to die in his life-time, or afterwards, without having any child or

(a) 1 Swants. 7.

(c) 7 Price, 205.

(b) 1 Young & Jer. 421.

(d) 13 Price, 193.

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1829.—*Dawkins v. Tatham.*


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children, then the testator gave the residue to his nephew and nieces, John, Elizabeth, and Mary Stone.

H. Dodderidge was an illegitimate child. He survived the testator, and died without ever having had any child.

The question was whether, under this bequest, the residue vested, absolutely, in H. Dodderidge : in which case the crown would have been entitled to it, he having died without issue ; and the attorney general was, in consequence, made a defendant in the cause.

Mr. *Wray*, for the Attorney General :—The failure of children is not, in this case, confined to the death of the legatee. A devise of real estate [\*491] to A. and to his children, A. having no child at the time, \*gives an estate tail to A.(a) It is now settled that there is no difference between estates by implication, and those that are expressly given. *Chandler v. Price.*(b) In that case Lord Loughborough says, "I agree," &c. There is no distinction between the expressions "dying without children," and "dying without having children;" and, as the former words will give an estate tail, why should not the latter have the same effect. Here the residue is given, in the first instance, to H. Dodderidge, absolutely ; the words "without having any child or children," imply an intention that the children were intended to benefit by the bequest. *Newton v. Barnardine,*(c) *Barlow v. Salter.*(d)

Mr. *Sugden* and Mr. *Barber* appeared for the nephew and nieces of the testator, but were not required to argue the case.

The VICE-CHANCELLOR :—It has been assumed, in the argument for the crown, that the words "without having any child or children," are to be taken as synonymous with the expression "without issue." But why am I to put a construction upon those words, which they do not strictly bear, for the purpose of defeating the intention of the testator. The question is, not what is the effect of words creating an estate tail, but of words making a gift over. It appears to me that I should defeat the testator's intention, in this case, if I did not hold that the gift over took effect on the death of H. Dodderidge.[1]

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[\*492]

\**DAWKINS v. TATHAM.*

1829 ; 21st February.—*Legacy duty.*

An annuity was given by a will, clear of all deductions, and was directed to be paid out of certain sums of stock standing in the testator's name : held, that it was not subject to the legacy duty.[2]

RANDAL WALWORTH, by his will, duly executed for devising real estates, gave all his real and personal estate to his executors, in trust, among other

(a) See 6 Rep. 17.

(b) 3 Ves. 99, see 101, 102.

(c) Moor. 127.

(d) 17 Ves. 479.

[1] Vide *Dalsell v. Welch*, ante, 326, note.

[2] The marginal note seems to convey a wrong impression : as if it meant that the annuity was not chargeable with the duty ; whereas the decision is, not that the annuity is free from duty, but, that it is not chargeable upon the annuitant.

1829.—*Heming v. Whittam.*

things, out of the dividends and interest of the trust moneys to pay, to his daughter, Jane Dawkins, the wife of Nathaniel Dawkins, for her separate use, for her life, an annuity of 46*l.*, clear of all deductions whatsoever, by half-yearly payments; the said sum of 46*l.* per annum to be paid out of 1000*l.* new 4 per cent. annuities, and 6*l.* per annum long annuities, then standing in his name, in the books of the bank of England.

The bill was filed, by Jane Dawkins and others, against the executors for an account of the personal estate, and to have the annuity secured.

The answer of the executor admitted assets for the payment of the annuity, and that the stock on which it was charged, was standing in the name of the testator.

A motion was made, by the plaintiffs, for the transfer of the stock into court. The question was whether the executors were entitled to deduct the legacy duty which had been paid by them.

Mr. *Wigram*, for the motion, cited *Barksdale v. Gilliat*.(a)

\*Mr. *Seton*, for the defendants, distinguished the case of an annuity [\*493] from that of a legacy, and submitted that, in the case of an annuity, the words "clear of all deductions," originally referred to the payment of land tax, and were, therefore, only applicable to the annuity as a charge upon the real estate, and cited *Brewster v. Kitchell*.(b)

But the court held that the legacy tax could not be deducted.(c)[1]

#### BENSON V. WHITTAM. HEMING V. WHITTAM.

1829; 21st February.—*Will.—Construction.—Evidence.*

J. B., at his death, had a balance due from his banker, and was also entitled to a share of the balance due to A. B., from his banker, A. B. having received moneys for him from time to time, and with his knowledge paid them to his own bankers as his own moneys; but J. B. had no concern with A. B.'s bankers, nor did they know that he was interested in the moneys paid by A. B. J. B. bequeaths all his money in the hands of any banker: held that his balance at his own banker's, and also his share of A. B.'s balance, will pass; and that evidence is admissible to show that he so intended.

JOHN BENSON, late of Peterborough, deceased, by his will, dated the 30th of May, 1822, gave to Sarah Acres and Mary Parsons, all his household furniture, plate, watches, linen, china, notes, bonds, ready cash, live stock and carriages, and all moneys due and owing to him (except what money might be in the hands of any banker, and 1,000*l.* lent by him to the trustees for repairing Peterborough Church, which he bequeathed to his brother Arthur Benson,) together with the lease or leases of any dwelling house, land, \*or [\*494]

(a) 1 Swanst. 562. (b) 1 Salk. 198; S. C. 1 Lord Raym. 317. (c) *Ex relatione*, Mr. Seton.

[1] Vide *Smith v. Anderson*, 4 Russ. 352. *Courtney v. Vincent*, Turn. & Russ. 433. *Louch v. Peters*, 1 Myl. & K. 489.

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 1829.—*Heming v. Whittam.*


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houses that he might have : and he appointed his brother Arthur Benson, and George Whittam, his executors.

A bill having been filed, by Arthur Benson, to have the trusts of the will carried into execution, and the rights of the parties claiming to be interested in the testator's estate ascertained and declared, the court referred it to the master, to inquire and state whether the testator had, at his death, any and what sum or sums of money in the hands of any and what bankers or banker, and of what the balance in the hands of Messrs. Drummond, the bankers, standing, at the testator's death, to the account of Arthur Benson, was composed ; and whether any and what part of such balance belonged to the testator ; and the master was to be at liberty to state any circumstances, specially, as to A. Benson's account with Messrs. Drummond, and as to any dealings and transactions between the testator and A. Benson.

In pursuance of this decree the master made a separate report, by which he found that John Benson, the testator, had been one of the committee clerks to the house of commons, and formerly resided in Westminster, but, for some years before his death, which happened on the 3d of April, 1827, had retired to Peterborough : that he kept an account with Messrs. York & Co. of Peterborough, as his bankers, and, at his death, had a balance of 2,428*l.* 11*s.* 3*d.* in their hands : that on the day of John Benson's death, there was a balance in the hands of Messrs. Drummond, to the credit of Arthur Benson, amounting to

4,554*l.* 17*s.* 3*d.* : that John Benson did not keep any account with [\*495] Messrs. \*Drummond, and that there was no distinguishing mark in

their books to denote money in their hands belonging to John Benson in the name of Arthur Benson, but that Arthur Benson sometimes gave directions to the clerk, when he paid in money, to enter the amount in two equal sums, though the whole was paid in at the same time, and not (as was usual in the common course of business) as one sum ; and, at other times, Arthur Benson directed the money, paid in by him, to be entered, in Messrs. Drummond's books, as received of John Benson : that Arthur Benson, after the retirement, to Peterborough, of John Benson, frequently settled, and received for him, his salary and fees, as a committee clerk to the house of commons, and, also, his dividend at the Bank of England, and, on most occasions, when John Benson did not direct any other application, or was in waiting for a suitable investment, Arthur Benson used to pay in, and mix the moneys so received for John Benson, with his, Arthur Benson's, own moneys at Messrs. Drummond's ; and that John Benson was apprised of, and sanctioned and approved that mode of dealing ; and, particularly, in a letter to Arthur Benson, dated the 16th of July, 1821, he wrote, as follows, concerning his committee fees of that year which had been received for him by Arthur Benson, and paid into Arthur Benson's account with Messrs. Drummond : " I am, thank God, getting better, and much gratified that our committee fees have turned out so favorably. As I am not in want of cash, at present, my proportion may remain at Drummond's, till I come to town." And the testator having been, subsequently, informed,

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 1829.—*Heming v. Whittam.*


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by different letters from Arthur Benson, that the latter had received other year's committee fees and salary, and, also, bank dividends, for him, and lodged the amount \*at Messrs. Drummond's, wrote, to Arthur, as fol- [\*496] lows, in a letter, dated the 19th of January, 1825: "with regard to my money that lies idle at Drummond's, and the bank, should my health permit, I propose coming up earlier than usual next spring, and will then determine respecting it:" that the first of the letters was written before the date of the testator's will, but after he was made acquainted with the fact that the moneys received for him by his brother, were, occasionally, paid into his brother's account at Messrs. Drummond's: that although Messrs. Drummond were not instructed to distinguish, in any manner, between the sums of money, from time to time, paid into Arthur Benson's account with them, as to which of such moneys were his, Arthur Benson's, own, and which might be receipts of his, for the testator; yet that, from various authentic sources of information, derived from memorandums of account of Arthur Benson himself, or marks occasionally made by him in the pass-books, and from clear evidence of the nature and manner of his dealing with the testator's affairs, all the items in the pass or banking books of Arthur Benson, relating to the testator, whether receipts for him, or payments over to him, or to his use, were, in fact, fully traced and made out, so that no question remained between the parties as to the items themselves. The report concluded by stating that the banking account with Messrs. Drummond was, at all times, the separate and exclusive account of A. Benson, and that John Benson never exercised or claimed any power over the same, and that Messrs. Drummond never had any privity or concern, with John Benson, with regard to the account or, any notice that J. Benson was interested therein.

\*Arthur Benson having died pending the suit, a petition was pre- [\*497] sented, by his executors, praying that the report might be confirmed, and that it might be declared that the sum of 3,019*l.* 18*s.* 2*d.* of the moneys of the testator John Benson, was in the hands of Messrs. Drummond the bankers, at his death, and that the petitioners might be declared entitled in right of A. Benson, to such sum of 3,019*l.* 18*s.* 2*d.*, as bequeathed, to A. Benson, by John Benson, under the description of money due or belonging to J. Benson in the hands of any banker.

Mr. Sugden, Mr. Knight, and Mr. Swann, for the executors of Arthur Benson:—In construing wills, parol evidence is admissible to ascertain what is the thing given. You may also inquire into all the circumstances of the testator, and of his property, at the time of making his will, in order to get at the real meaning of the words: not to put a construction on the words contrary to what they import, but to find what they really mean. Here the testator uses the expression: "money in the hands of any banker," and he couples it with a debt due to him. Now money at a banker's has been held to pass under a bequest of debts. The two brothers were clerks in the house of commons. Arthur received John's fees, at the same time as he received his



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 1849.—*Heming v. Whittam.*


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own; and they were exactly of the same amount. Arthur, when he paid a sum of 2,600*l.* into Drummond's, desired that there might be two entries, in their books, of 1,300*l.*, instead of one entry of 2,600*l.*; what could he mean by that, except to keep his brother's money distinct from his own. In the banking-book, Arthur marked, some of the sums paid in, with his [\*498] own initials, \*and others with those of his brother, and, in his own books, kept distinct accounts of his own and of his brother's money. Every sum that had been paid in on account of John, was afterwards applied for his use. In every instance the testator's money was applied according to his directions.

*Mr. Horne and Mr. Barber for Sarah Acres and Mary Parsons* :—Evidence cannot be gone into, for any purpose, except to ascertain what the property is on which the will is to operate. The will cannot be explained, as to the testator's intention, by any papers that are not testamentary, but must speak for itself. The testator had a banker of his own, with whom he kept a regular account, and in whose hands he had a large balance. Messrs. Drummond were not his bankers. The account kept with them was Arthur's account. The money was all paid in, by Arthur, as his own money; and was not earmarked so as to show that it was John's. At one time Arthur had not money enough in Drummond's bank to answer what he had received for the testator. And, if Arthur had over-drawn his own money, he could not have said, to the Messrs. Drummond: "you have no right to take credit for the remainder of the money, against me, because it is not my money, but my brother's." If a bill had been filed for the administration of Arthur's estate, the money at Drummond's would have formed part of his assets. If an agent writes to his principal, and says that he has paid money belonging to the principal, into his own banker's the principal cannot demand it, unless it is paid in to the [\*499] principal's separate account. Here there was no \*appropriation of John's money. Arthur mixed it with his own. The bankers were not accountable to John; and he could not have sustained an action against them. They could not have paid a single shilling of the money to John Benson, or to his order. Arthur stood in the relation of debtor to John, and that relation was not altered by Arthur not keeping the money in his pocket, but paying it into a banker's with his own money. It is absurd to say that, if persons owed the testator money, and they kept their money in a bank, that money would pass by this bequest. Arthur did not discharge himself by paying the money into Drummond's. If they had failed, Arthur would still have remained liable to John. Suppose that Arthur had died insolvent, could the executors of John have intercepted this money as against his general creditors? Unless that part of Arthur's balance, which arose from the moneys received for John, can be strictly said to be the money of John, it is a debt, and, if it be a debt, it is expressly given to our clients. If the court comes to that decision, the words of the exception will still operate upon the balance in the Peterborough bank.

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Mr. *Purvis* appeared for the next of kin of the testator, but did not argue the case.

The VICE-CHANCELLOR:—The only point to be considered here is, what the testator meant by the terms which he has used in his will: and, admitting that the first words of the bequest would have given to Mrs. Parsons and Miss Acres, all the money that was due and owing to the testator, the question is, whether the exception of what money might be in the hands of any banker, \*will not comprehend, not only that balance which was due to [\*500] him from his banker at Peterborough, but also such sum of money in the hands of Messrs. Drummond, as, regarding the mode of dealing between himself and his brother, was considered, by the testator, as his own money at Drummond's.

It is, I think, quite clear, from what is stated upon the master's report, that John did actually look upon the money at Drummond's that is, that portion of it which his brother had received for him, and afterward paid into his own account, as his (John's) own money. He has expressly referred to it in the letters that are stated in the report, one of which was written before, and the other after the date of the will. In the former of those letters he says: "As I am not in want of money at present, my proportion may remain at Drummond's, until I come to town." It is impossible to say that, at that time, the money which his brother owed to him, in consequence of having received his fees and paid them into Drummond's, was not considered by him as his own money. Then, in the letter of the 19th of January, 1825, he says: "With regard to my money that is idle at Drummond's and the bank, should my health permit, I propose coming up earlier than usual next spring, and will then determine respecting it."

It appears that the course of dealing pursued by Arthur with respect to the sums of money which he received on account of John, was either to pay debts which John owed in London, or to purchase stock for him. Then the question is, whether the words of the exception are not applicable, not only to the money \*in the hands of the testator's own banker, but also to that [\*501] proportion of the money in the hands of Arthur's banker, which, as between Arthur and John, was admitted by Arthur, and was considered by John, to be John's own money in the hands of Drummond's.[1]

Now any article of property may pass by words of description which do not legally and strictly describe it, provided that it can be made out that the words do, in the sense in which the testator used them, describe what he meant. Where legatees are mentioned in a will by names which they never, in point of fact, had; yet they will take, upon its being proved that the testator intended

[1] A testatrix, whose personal estate consisted chiefly of stock, after bequeathing a number of pecuniary and specific legacies, and giving directions as to her funeral, and a certain sum to her executors for their trouble, bequeathed whatever remained of money to certain persons; it was held that the words "whatever remains of money," referred to the general residuary personal estate. *Dowson v. Gaskoin*, 2 Keen, 14. But see *Mann v. Mann*, 14 Johns. Rep. 1.

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them. So if a testator gives his Colton estate, it has been decided that whatever he is shown to have considered as part of his Colton estate, will pass ; but if he gives his estate of Colton,(a) then you can only inquire what lands he had in the district called Colton.

I cannot help thinking that the testator used the expression "any banker," for the purpose of comprehending, not only the money that would be in the hands of his Peterborough bankers, but also the money that would be in the hands of Messrs. Drummond, in the way in which it appears to have been ; and I, therefore, think that that money does pass by those words.[1]

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[\*502]

\*FARMER V. MARTIN.

1828 : 27th February.—*Appointment.*

A. having a power to appoint 10,000*l.* amongst his younger children, appoints it to them equally, reserving to himself a power of revocation as to 5000*l.*, which he afterwards irrevocably appoints to E., one of the children, in consideration of her having agreed to apply part of it in payment of his debts. Afterwards A., by a deed, to which E. is also a party, revokes, with her consent, the last appointment, as to 2500*l.*, and, in pursuance of all powers, appoints that sum to a child by a second marriage, and confirms E.'s title to the remainder under the former appointment. Held, that the appointment of the 5000*l.* being void, the appointment of the 2500*l.* must also fail.

By indentures of lease and release, of the 11th and 12th of February, 1771, estates, in the counties of Cambridge, Worcester and Gloucester, were conveyed to Thomas Martin the elder, for life, with remainder to his first and other sons, in tail male ; and Thomas Martin the elder, was empowered to demise any part of the estates, to trustees, for a term of years, to commence from his death, upon trust to raise 10,000*l.* for the portion or portions of all and every or any of his child, or children, other than an eldest or only son, such sum to be paid to or amongst such child or children, in such shares, and at such times, and subject to and under such powers of revocation, conditions,

(a) See 1 Powell on Devises, edited by Mr. Jarman, p. 470, note. This work appears to be one of the most useful that, of late years, has been given to the profession.

[1] "I may observe generally on the reception of extrinsic evidence, with a view to aid the construction, and give explanation, not to alter or control the sense—a purpose for which it can never be received—that there is a manifest difference between the declarations, whether verbal or written of a testator, and the proof of facts and circumstances, by the knowledge of which the court, when called upon to construe, may be placed in the same situation with the party who made the instrument, and may be thereby the better able to understand his meaning." Lord Brougham, in *Guy v. Sharp*, 1 Myl. & K. 589. "In cases which require it, the court may look at external circumstances, and, consequently, receive evidence of such circumstances for the purpose of ascertaining the meaning of the terms used by the testator. But parole evidence is not to be resorted to, except for the purpose of proving facts which make intelligible something in the will, which, without the aid of extrinsic evidence cannot be understood." *Clementson v. Gandy*, 1 Keen, 309. See further *Pycroft v. Gregory*, 4 Russ. 526. *Lowe v. Lord Huntington*, id. 532, note. *Weall v. Rice*, 2 Russ. & M. 251. *Boys v. Williams*, id. 689. S. C. 3 Sim. 563, reversed. *King v. Badely*, 3 Myl. & K. 417. *Mann v. Mann*, 14 Johns. Rep. 1. *Williams v. Crary*, 4 Wend. 443. *Schanber v. Jackson*, 2 Wend. 13.

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provisoes, limitations, declarations and agreements, as, in the deed or deeds by which the power should be exercised, should be inserted and declared. By indentures of lease and release, of the 21st and 22d of September, 1778, estates in Surrey were settled to the same uses, and subject to a similar power ; but they were to be auxiliary only to the other estates in raising the 10,000*l*.

In 1794, Thomas Martin the elder, having then living two children only, namely, the plaintiff, Judith Farmer, and the defendant, Eleanor Martin, by an indenture, dated the 16th of July in that year, after reciting that he was desirous of providing portions for his two daughters, pursuant to the before-mentioned \*powers, in exercise of those powers, demised the [\*503] estates, to George Martin, for one thousand years, to be computed from the day of his decease, upon trust to raise 10,000*l*., for the portions of his two daughters, and to pay the same to them, in equal shares, with interest at 4 per cent., from his decease ; and he declared that the portions should, upon the execution of the indenture, become vested and transmissible interests in his two daughters : provided that it should be lawful for him, by deed or will, to revoke or to vary the appointment by appointing more of the 10,000*l*. to one than to the other of his daughters, or by appointing the same to them or either of them, or to such other child or children as he might thereafter have, except an eldest or only son.

In 1796, George Martin, the trustee of the term, died, having appointed the defendant, the Rev. Joseph Martin, his executor. In 1804, Thomas Martin the elder, being desirous that the interest of his two daughters in a moiety of the 10,000*l*., should become irrevocable, by an indenture dated the 27th of March, in that year, in pursuance of the power reserved by the deed of the 16th July, 1794, absolutely and irrevocably appointed 5,000*l*., part of the 10,000*l*., to his two daughters, in equal shares, but such last-mentioned appointment was not to prevent his exercising the power, reserved by the deed of July, 1794, as to the remainder of the 10,000*l*.

In 1806, Thomas Martin the elder, being in embarrassed circumstances, and having an illegitimate son, the defendant, Thomas Martin the younger, it was arranged, between him and his daughter Eleanor, that \*he [\*504] should make an irrevocable appointment of the remaining 5,000*l*. to her, and that she should assign part of that sum for the benefit of his creditors and make a provision, for Thomas Martin the younger, out of the remainder. In pursuance of this arrangement, Thomas Martin the elder, by a deed poll of the 26th of November, 1806, (after reciting the several deeds before mentioned,) by force of the powers given to him by those deeds, and, particularly, by the deed of the 27th of March, 1804, in consideration (as it was expressed) of his natural love and affection for his daughter Eleanor, irrevocably appointed, to her, 5,000*l*., the remainder of the 10,000*l*. : and Eleanor Martin, by an indenture of the 18th of April, 1807, assigned to Thomas Martin, the younger, a moiety of the last-mentioned 5,000*l*., but she refused to assign any part of that sum for the benefit of her father's creditors.

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In 1801, Thomas Martin, the elder, married Anne Payne, and had issue, by her the defendants, James Thomas Martin, and Ann Martin: and, by a deed poll of the 6th of August, 1819, executed by Thomas Martin the elder, and his daughter Eleanor, after reciting the deed poll of the 26th of November, 1806, and that Thomas Martin the elder, was desirous of revoking the appointment, thereby made in favor of Eleanor Martin, so far as related to 2,500*l.*, part of the 5,000*l.*, thereby appointed, and of absolutely appointing the 2,500*l.*, the former appointment of which was intended to be thereby revoked, to or in favor of Ann Martin, and that, in consideration of Thomas Martin the elder, having agreed to secure, to Eleanor Martin, an annuity of 250*l.*, during her natural life, if she should so long live, Eleanor

[\*505] Martin had agreed to join in executing \*the present deed poll, in order to testify her consent to Thomas Martin the elder, revoking the appointment of the 2,500*l.*, as appointed by the deed poll of 26th of November, 1806, and to his appointing the same in favor of Ann Martin, in the manner after mentioned, and also to confirm such appointment, as far as was in her power: it was witnessed that, in pursuance of the agreement, and of the annuity of 250*l.*, intended to be secured, by Thomas Martin the elder, to Eleanor Martin, to commence from the date thereof, Thomas Martin the elder, with the privity of Eleanor Martin, and in exercise of all powers enabling him in that behalf revoked the appointment, made by the deed poll of the 26th November, 1806, of and concerning 2,500*l.*, part of the 5,000*l.* thereby appointed in favor of Eleanor Martin, and he appointed, and Eleanor Martin ratified and confirmed, the said 2,500*l.*, unto Ann Martin, and declared that the same sum should, immediately upon the execution thereof, be a vested interest in her, and as such, transmissible to her executors, administrators and assigns, absolutely and wholly acquitted and discharged from any control, power or claim of Thomas Martin, the elder, or of Eleanor Martin: and it was thereby provided that nothing therein contained should extend or be construed to extend to affect or render void the appointment, made by the deed poll of the 26th of November, 1806, of the sum of 2,500*l.*, the other part of the 5,000*l.* thereby appointed in favor of Eleanor Martin absolutely, but that she should continue fully and absolutely entitled to the same sum of 2,500*l.* in the same manner as she would have been entitled thereto if the present deed poll had not been executed.

[\*506] \*In July, 1821, Thomas Martin the elder died.

The bill was filed, by Mr. and Mrs. Farmer, against James Thomas Martin, Thomas Martin the younger, Ann Martin, the Rev. Joseph Martin, and Sir Anthony Lechmere and John Williams Martin, who were the trustees of Mr. and Mrs. Farmer's marriage settlement, and also against Peter Earnshaw, who was in possession of the deed poll of the 26th of November, 1806. It alleged that Sir A. Lechmere and John Williams Martin were, as trustees of the plaintiff's marriage settlement, entitled to 2,500*l.* part of the 10,000*l.* under the indenture of the 27th of March, 1804; and that the deed poll of the 26th of November, 1806, having been made under the circumstances before

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stated, was fraudulent and void, as against the plaintiffs, and that the plaintiff Judith Farmer, or the plaintiff Thomas Farmer, in her right, was, under the indenture of the 16th of July, 1794, entitled to the farther sum of 2,500*l.*, other part of the 10,000*l.*

The bill charged that Thomas Martin the elder had, in August, 1819, no right or power to execute the deed-poll of the 6th of that month.

The bill prayed that the 10,000*l.* might be raised, by sale or mortgage of the estates, and that the deed poll of the 26th of November, 1806, might be declared to have been executed, by Thomas Martin the elder, in fraud and violation of, or contrary to the true intent and meaning of the settlements of the 11th and 12th of February, 1771, and 21st and 22d of September, 1778, and that the same was null and void or voidable, as against the plaintiffs; and that Earnshaw might be decreed to deliver up that deed poll, to be cancelled: and that the 10,000*l.* might be paid, in moieties, to the plaintiffs Judith Farmer and Eleanor Martin; and that 2,500*l.*, being one-half of Judith Farmer's share, might be paid, to Sir Anthony Lechmere and John Williams Martin, upon the trusts of the plaintiff's marriage settlement, and that the other half of such share might be paid to the plaintiff Judith Farmer, or to the plaintiff Thomas Farmer, in her right, and that it might be declared that Thomas Martin the elder had, in August, 1819, no right, power or authority to make or execute the deed-poll of the 6th of that month, and that the same was wholly void, as against the plaintiffs, and that it might be set aside accordingly. Eleanor Martin died, after having put in her answer. The defendant Thomas Martin the younger, was her executor, and the suit was revived against him.

There was no evidence that the annuity of 250*l.* had been ever paid, or granted to Eleanor Martin.

Mr. Treslove, Mr. Bickersteth, and Mr. Mathews, for the plaintiffs, said that the deed-poll of 1806 contained no power of revocation, and that, therefore, Thomas Martin the elder could not, by the deed of 1819, affect the appointment made by the deed-poll of 1806: that the deed of July, 1794, remained in force as to the 5,000*l.* not irrevocably appointed by the deed of 1804, the deed of 1806 being void. *Daubeny v. Cockburn.* (a)

Mr. Sugden, and Mr. Turner, for the defendant Thomas Martin:— This defendant is entitled to 2,500*l.* in his own right, and to 2,500*l.* [\*508] as the representative of Eleanor Martin.

The deed of 1819, so far as respects the 2,500*l.* not appointed to Ann, operates as a confirmation of the appointment of 1806. To give effect to an appointment, it is not necessary to use any precise form of words. A mere recital that the party has made an appointment, is a sufficient indication of intention to vest the fund in the appointee. The proviso in the deed of 1819 amounts to an appointment.

But, if this view of the case cannot be supported, Thomas Martin the younger

1838.—*Farmer v. Martin.*

is entitled to 5,000*l.* as the representative of Eleanor Martin ; for, if the deed of 1806 cannot be maintained, Eleanor Martin took nothing under it, and, therefore, she could make no assignment to Ann Martin. It is impossible to support the deed of 1819, unless the deeds of 1806 and 1807 are maintained ; for Eleanor did not intend to divest herself of any part of the fund, unless Thomas Martin should take what was given to him. The deed of 1819 is one entire agreement between the parties. The contract between the parties was entire ; and if part of it cannot take effect, it must altogether fall to the ground ; and, consequently, the appointment of July, 1794, must prevail.

Mr. *Pepys*, and Mr. *Knight*, for the defendant Ann Martin, contended that, the deed of 1806 being void, the power of Thomas Martin the elder, under the deed of 1804, was not affected by it, and remained capable of being exercised ; and that he had exercised it by the deed of 1819 : that there was no [\*509] evidence \*to affect the claim of Ann Martin : as the answers of Eleanor and Thomas Martin, which had been read in support of the case made by the plaintiffs, could not be used against Ann Martin : that the title of the assignee could not be impeached by the answer of the assignor ; and that, therefore, the answer of Eleanor Martin, or of any person claiming under her, could not affect the right of Ann Martin. *Lord Teynham v. Webb.*(b)

Mr. *Barber*, for the defendant Earnshaw, said that, as the plaintiffs had examined him as a witness, they must pay him his costs. *Harvey v. Tebbutt.*(c)

Mr. *Treslove*, in reply, said that the plaintiffs were under the necessity of making Earnshaw a party to the suit, because he had the deed-poll of November, 1806, in his custody, and refused to deliver it up, although he admitted, in his answer, that he did not claim to be a trustee of that deed-poll, or to be entitled to any interest under it, but merely alleged that he had been advised that he should not be justified in delivering it up to be cancelled.

Mr. *Girdlestone* and Mr. *Joseph Martin*, appeared for the other parties.

The VICE-CHANCELLOR :—The principal question to be considered in this case, is what effect is to be given to this deed poll of 1819 ; because, if that instrument is capable of operating as the original execution of the power, then it would operate so as to give 2500*l.* to Ann Martin, and the other [\*510] 2500*l.* to Eleanor ; and the question is whether, \*upon the fair construction of this deed, it can be taken to have that operation.

Now this deed poll, to which Thomas Martin the elder, and Eleanor Martin, are parties, recites the deed poll of November, 1806, at length ; and then it proceeds : “Whereas the said Thomas Martin is desirous,” [His Honor here read the deed poll of 1819 ;] so that it is clear, upon the face of this deed, that there was no otherwise an intention to deal with the property, than by the execution of a supposed power of revocation, and new appointment, after the revocation had taken effect, of 2500*l.* to Ann Martin, and a ratification to Eleanor—not an appointment of 2500*l.*, absolutely and independently to her, but only

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a declaration that this instrument should not impeach or affect the title that she had by the deed poll of November, 1806, but that she should remain entitled to the 2500*l.*, part of the 5000*l.* appointed by that deed poll, in the same manner as she would have been entitled if the deed of 1819 had not been executed.

Now, in order to see what the parties intended, one must consider the circumstances under which the deed of 1819 was executed ; because it is plain to me that Eleanor Martin and her father were acting upon the supposition that Eleanor had a complete title by the deed poll of November, 1806, and the father did not mean to give her, by the deed of 1819, any other title than such as the deed of November, 1806, had already given her : and, (as I think,) it is impossible to take this instrument as an appointment, *de novo*, of the 5000*l.* between the two. It would be a most extraordinary thing to hold that, (because the father, \*in this instrument, has used a general expression [\*511] in the clause of revocation, namely, he does, "in pursuance of all powers, &c., revoke," without repeating those words when he comes to make the appointment,) it is to be taken as an absolute appointment to Ann, of 2500*l.* ; when it is perfectly clear, upon the face of the instrument itself, that it was not intended to operate as an appointment, to Eleanor, of the sum of 2500*l.*, under the power contained in the deed of 1804. It does appear to me, therefore, that this deed cannot be set up, on the part of Ann Martin, as an instrument giving to her 2500*l.*

Then the question will be, if Ann, (whose title can only be found under the deed of 1819,) cannot take upon the face of the instrument, by means of the exercise of the power of appointment, which was vested in the appointor by the deed of 1794, and confirmed by the deed of 1804, whether the deed of 1806 can stand ? Now it does appear to me, from what has been read from the answer of Eleanor Martin, and from the answer of Thomas Martin, that there is enough evidence to show that there was such a course of dealing between Eleanor and her father, for the benefit of the father and Thomas Martin, (who in no way could have taken under the appointment, whose interest, therefore, is in fact the interest of the father, because, so far as a provision could be made, circuitously, for Thomas, out of the residue, the father did take the benefit,) that the deed of 1806, did proceed upon a footing, which, in a court of equity, is always held to vitiate the appointment altogether. I think, therefore, that upon the face of the deed of 1819, Ann takes nothing.

\*My opinion is that the instrument of 1819 was intended to be, what [\*512] it appears to be, that is, an execution of a power which the parties supposed to exist, but which, in point of fact, did not exist, and not as an original appointment.

It would, I think, be extravagant to suppose that this instrument could be taken as an assignment, by Eleanor, to Ann, of 2500*l.* ; when, in point of fact, the instrument itself shows quite a different intention between the parties. It is quite clear that Eleanor only supposed she was confirming that which the father might appoint, and not that she was making an assignment ; and, if it



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 1829.—*Sutton v Mashiter*.
 

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were so, it must be proved, (which has not been done,) that there was a consideration. The mere circumstance of an agreement to pay, without proof of payment, never can be taken as a consideration.

The result of my opinion will be, that 2500*l.* of the sum remaining to be appointed, must be paid to the trustees of Mrs. Farmer's settlement, and 2500*l.* will go to herself and her husband. As to the other 5000*l.*, it will go to the personal representative of Eleanor Martin.

Next with respect to the costs :—As the suit was rendered necessary by the dealing between Thomas Martin the elder, and Eleanor Martin, the costs of the plaintiffs must be paid out of that lady's share of the 10,000*l.* The plaintiffs must pay the costs of James Thomas Martin, Mr. Earnshaw, and the trustee of the term, and must be repaid the amount out of Eleanor's share.[1]

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[\*513]

\**SUTTON v. MASHITER.*1829 : 2d March.—*Injunction.*

If a cause for the administration of assets has been heard for further directions, and the executors have paid their balances into court, an injunction will be granted to restrain an action, against the executors, for breaches of covenant in a lease granted to the testator, and the master will be directed to ascertain the damages.

THE testator, in this cause, had held a farm and buildings under a lease. The suit was instituted for the administration of his estate ; and the usual decree had been made. No claim of any debt or damages having been brought in, the master reported accordingly. The cause was then heard for further directions ; and, in pursuance of the decree, the executors had paid into court all their balances belonging to the estate. The lessor afterwards commenced an action against the executors, as executors, for breaches of the covenant to repair, contained in the lease ; and was proceeding to trial at the next assizes.

Mr. *Bickersteth* and Mr. *Jacob*, for the executors, now moved for an injunction to restrain the action.

Mr. *Barber*, for the lessor, opposed the motion, and said that, after a decree for the administration of a testator's estate, the court would restrain an action by a creditor, for a debt, because a debt was an ascertained sum ; but that, in this case, the damages were not ascertained ; and the master had no jurisdiction to decide whether there had been any breach of covenant, or not : that it was quite another question whether the court would restrain the plaintiff in the action, from taking out execution, after verdict.

[1] Vide *Lee v. Fernie*, 1 Beav. 423. If the donee of a power appoint the fund to one of the objects of the power, under an understanding that the latter is to lend the fund to the former, although on good security, the appointment is bad. *Arnold v. Hardwick*, 7 Sim. 343. A power of appointing a fund between A. B. and C., is well executed by an appointment between A. B. and the husband of C. ; but an appointment to such husband of a share of the fund, after deducting therefrom a debt due to the appointor is an invalid execution of the power, so far as regards the direction to deduct. *Hewitt v. Lord Dacre*, 2 Keen, 622.

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1829.—*Davenport v. Manners.*

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THE VICE-CHANCELLOR :—It is clear that the court will not allow this person who is in the character of a creditor, to go on with his \*ac- [\*514] tion. It may be ascertained, by the master, as well as it could be by a jury, whether any breach of covenant has been committed, and what is the amount of the damage : and, therefore, I shall grant the injunction without costs, and refer it to the master to ascertain the amount of the damages in respect of the alleged breaches of covenant.

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DAVENPORT V. MANNERS.

2d March.—*Practice.—Dismissal of bill.*

If, between the giving of a notice of motion to dismiss, and the making of the motion, the plaintiff obtains an order to amend, the plaintiff must pay the costs of the motion, but no order will be made upon it.

THE defendant had given a notice of motion to dismiss the bill, for want of prosecution ; but, before the motion could be made, the plaintiff had obtained, at the rolls, an order to amend the bill, as of course.

Mr. Koe, for the defendant, now moved to dismiss the bill, according to the notice.

Mr. Norton, for the plaintiff, opposed the motion, on the ground of the plaintiff having obtained the order to amend.

The Vice-Chancellor said that, as the plaintiff had obtained an order to amend his bill, before the motion to dismiss was made, he could not make any order upon that motion, but that the plaintiff must pay the costs of it to the defendant.

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\*DAVIS V. DAVIS.

[\*515]

1829 ; 2d March.—*Practice.—Injunction.*

The common injunction is not dissolved by the plaintiff obtaining an order to amend without saving the injunction, unless the record is altered.

IN this case the common injunction had issued. The plaintiff, afterwards, obtained an order to amend his bill, without saving the injunction : the question was, whether the obtaining of the order to amend, did, of itself, discharge the injunction.

The Vice Chancellor said that the injunction was gone, unless the record was altered.[1]

Mr. Knight for the plaintiff.

Mr. Sugden for the defendant.

[1] Vide *Grant v. Grant*, ante 14. *Home v. Watson*, ante 85, 86 note. *Pickering v. Hanson*, ante 488, and note *ibid*.

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 1829.—Hodgson v. Murray.
 

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## HODGSON V. MURRAY.

1829; 4th March.—*Promissory Note*.—*Injunction*.

Courts of equity have a concurrent jurisdiction with the courts of law in relieving against promissory notes, taken when over-due.

THE bill prayed that a promissory note, for 8,000*l.*, which had been given, by the plaintiff, to Rowland Stephenson, and which the latter, after it became due, had delivered to the defendant as a security for a debt to a greater amount, due from him to the defendant, might be delivered up to be cancelled, and that the defendant might be restrained from proceeding in the action, which he had commenced against the plaintiff, upon the note. The bill alleged that Stephenson had agreed to advance the 8,000*l.*, to the plaintiff, to enable him to pay for an estate which he had contracted for; that the contract failed, and consequently that nothing was ever advanced upon the note, and that the [\*516] note was, from inadvertence, left in Stephenson's hands. \*The defendant, by his answer, denied any knowledge of the transactions between Stephenson and the plaintiff: he admitted that, when Stephenson produced the note to him, Stephenson's endorsement on it was cancelled: that the reason assigned by Stephenson for the cancellation, was to prevent the amount being recovered in case the note should be lost, and that Stephenson afterwards re-endorsed it.

Mr. Sugden and Mr. Ching, for the plaintiff, said that a person who took a note when it was over-due, held it subject to all the equities that it was liable to in the hands of the original holder: [1] that, although the plaintiff might avail himself of that defence in a court of law, this court was not ousted of its jurisdiction; and they referred to *Byne v. Vivian*, (a) *Byne v. Potter*, (b) *Bromley v. Holland*, (c) and *Watkins v. Maule*. (d)

Mr. Horne, Mr. Burge, and Mr. Swann, for the defendant, said that the court could not direct that the bill should be delivered up to be cancelled, as the defendant might sue Stephenson, if he could not sue the plaintiff, for the amount; that the principle on which the plaintiff sought relief was originally established in the courts of law, and was not adopted by them from this court; that the bill sought to oust the courts of law of their jurisdiction in a case where they did complete justice, and that, therefore, the plaintiff had no right to apply to this court for its extraordinary interference: that the answer did not show that there was nothing due on the note as between the plaintiff and [\*517] Stephenson, but stated that the \*defendant knew nothing of the transactions between the plaintiff and Stephenson, and therefore the plain-

(a) 5 Ves. 604. (b) *ibid.* 609. (c) *Ibid.* 610, and 7 Ves. 3. (d) 2 Jac. & Walk. 237, see 244.

[1] Vide *Andrews v. Long*, 13 Peters, 65. *Johnson v. Bloodgood*, 1 Johns. Cas. 15. *Sebring v. Rathbun*, *id.* 331. *Jones v. Caswell*, 3 Johns. Cas. 29. *Hendricks v. Judah*, 1 Johns. Rep. 319. *Lansing v. Gaine*, 2 Johns. Rep. 300. *O'Callaghan v. Sawyer*, 5 Johns. Rep. 118. *Lansing v. Lansing*, 8 Johns. Rep. 454. *Anderson v. Van Alen*, 12 Johns. Rep. 343.

1828.—The Attorney General v. Solly.

tiff had not proved, as he ought to have done, that there was nothing due from the one to the other : that the plaintiff, by suffering the note to remain in Stephenson's hands, had enabled the latter to commit a fraud upon the defendant, and had been guilty of greater negligence than the defendant had: that the defendant, if permitted to go to trial, might be able to prove facts from which a jury would infer that the plaintiff suffered Stephenson to retain the note for the purpose to which it had been applied, and would thereby get rid of the equity arising from the defendant's having taken it when it was over-due.

The VICE-CHANCELLOR :—This is a very suspicious case on the part of the defendant.

Although a court of law may not allow the defendant to recover upon this note, it is no reason that this court should be deprived of its jurisdiction. It appears to me to be a question that ought to be further inquired into in this court.

Motion granted.[1]

\*THE ATTORNEY GENERAL V. SOLLY.

[\*518]

1829; 7th March.—Account.—Trustee.

A trustee of a charity estate, who had used the balances of the rents in carrying on his trade, will be charged with interest at 5 per cent. but not with annual rests.

THE defendant was a trustee of a charity estate, and had paid the balances of the rents received by him, into a mercantile house, in which he was a partner.

Mr. Pemberton, for the Attorney-General, contended that yearly rests ought to be made in taking the account of the rents and profits received by the defendant, and that he ought to be charged, with interest at five per cent. upon the balances found due from him. *Raphael v. Boehm*, (a) *Heathcote v. Hulme*, (b) *Stacpoole v. Stacpoole*, (c) *Walker v. Woodward*, (d) *Griffith v. Heaton*. (e)

Mr. Sugden and Mr. Tinney, for the defendant, said that *Stacpoole v. Stacpoole* was a case of fraud: that, in *Raphael v. Boehm*, there was a direction for accumulation; and that, in *Walker v. Woodward*, the order for making rests was obtained by surprise. They cited *Crackelt v. Bethume*, (f) and *Sutton v. Sharp*. (g) and added that rests were not ordered in those cases, because they did not come within the very words of *Raphael v. Boehm*.

Mr. Pemberton, in reply, said that *Crackelt v. Bethume* was distinguishable

(a) 11 Ves. 92.

(b) 1 Jac. & Walk. 122.

(c) 4 Dow. 209.

(d) 1 Russ. 107.

(e) Sim. & Stu. 271.

(f) 1 Jac. & Walk. 586.

(g) 1 Russ. 146.

[1] Vide *Blain v. Ager*, ante 295 and note *ibid.* *Fitzgerald v. Stewart*, ante. 342.

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 1829.—The Attorney General v. Solly.
 

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from *Raphael v. Boehm*, because, in the latter case, the money had [\*519] been \*employed in trade, which had not been done in the former : that *Crackelt v. Bethune* could not be reconciled with *Stacpoole v. Stacpoole* ; and that the authority of the house of lords must prevail over that of the master of the rolls.

The VICE-CHANCELLOR :—I do not think that there is sufficient authority to justify me in directing the account to be taken, in this case with annual rests. *Raphael v. Boehm* is an excepted case ; and I never could understand upon what principle Lord Eldon confirmed the master's report in that case. Here there is no express direction that there shall be an accumulation, the violation of which was the ground for directing annual rests to be made in that case ; nor is there any fraud here, as there was in *Stacpoole v. Stacpoole*, where the trustee gave in false accounts.

As the defendant, Solly, received the rents, and used the money in carrying on his trade, he ought to be charged with interest at five per cent. upon his balances, but yearly rests ought not to be made.[1]

[1] All trustees are chargeable with interest, if they have made use of the money themselves, or have been negligent in not paying the money over, or in not investing it, or not loaning it so as to make it productive. *Duncomb v. Duncomb*, 1 Johns. Ch. Rep. 508. *Manning v. Manning*, id. 535. A trustee not being allowed to make any gain, profit or advantage from the use of the trust funds, if he employ them in his own business or trade, or in making large loans for his own benefit, and upon the settlement of his accounts before the master, does not show what were the profits of the assets so employed by him, the master may very properly, not being furnished with any other guide, make yearly rests, for the purpose of charging him with compound interest ; and Chancellor Kent overruled exceptions to a report founded on that principle. *Schieffelin v. Stewart*, 1 Johns. Ch. Rep. 620. There is nothing in the case of *Clarkson v. De Peyster*, Hopkins, 427, decided by Chancellor Sandford, militating with the decision of his predecessor, so far as was necessary for the decision of the case. It was a suit between guardian and ward. The principle was acknowledged, that profits derived by the guardian from the trust fund, belonged to the ward, and an inquiry was directed, to ascertain whether the guardian had made profits. There may be cases of gross delinquency, in which the trustee ought to be charged with compound interest ; but such was not the present case ; and as the guardian was acting in good faith, but chargeable with some degree of negligence ; omitting to invest the funds, and mixing them with his own, but not employing them in trade, he was charged with simple interest. "When," says Chancellor Sandford, "compound interest has been allowed in England, it has usually been charged at five per centum, the legal rate of that country ; but in many cases interest upon interest has been computed at four per centum, under the name of equitable interest, and as a mitigation of the legal rate. This idea of an equitable rate of interest, less than the rate established by law, has never been adopted in this state. Our legal rate of interest is seven per centum a-year ; and interest by this rate converted into principal, gives results far exceeding any compound interest, which has ever been allowed in England. Few persons, however vigilant and active they may be, are able in this state, to invest money without hazard, and obtain from it accumulations equal to the results of compound interest at seven per centum a-year. He whose funds are held in trust insists with reason that they shall never be put in hazard ; and he can never justly claim as interest, greater interest than he could have received, had he himself made secure investments. To charge a trustee with interest upon interest at seven per centum, must in general be to charge him with much more than he actually received, or could have received from any safe investment ; and would be, to require from him, when acting for others, what he cannot do when he acts for himself. Such a sentence can never be just, otherwise than as a punishment for fraud or very culpable misconduct." "But," says Chancellor Kent, "there are cases which not only contain the general principle, that a trustee using the trust money must ac-

1829.—Porter v. Clarke.

## \*PORTER AND OTHERS v. CLARKE AND OTHERS.

[\*520]

1829; 10th March.—*Jurisdiction*.—*Dissenters*.

The court will not interfere to prevent the removal of the minister of a dissenting chapel vested in trustees, when the deed is silent as to the mode of electing the minister and his continuance in office, and contains no provision for his support, but he is dependant for it on the voluntary contributions of his flock.

THE plaintiff, John Paul Porter, had been, for thirty-seven years, the pastor or minister of a dissenting congregation, at Bath, of the denomination of particular baptists, having been, originally, elected to that office, and ordained in the mode usual amongst that class of dissenters.

The chapel and buildings were vested in trustees upon the following trusts:—"To permit and suffer the said messuage, tenement, meeting house, buildings and premises to be used as and for a place for the worship of Almighty God, by the congregation of Protestants dissenting from the Church of England, under the denomination of Particular Baptists, holding the doctrines of personal election, imputation of original sin, effectual calling, free justification and final perseverance of the saints, and by the members and successors of the same congregation of Protestants holding the same doctrines."

Shortly before the filing of the bill, differences had arisen, in the congregation, some of the members being desirous of appointing Owen Clarke to be co-pastor with Porter, while others were averse to such appointment. However, on the 13th of March, 1828, a church meeting was held, at which it was resolved to invite Clarke to preach at the chapel for three \*months, as a [\*521] probationer to be co-pastor with Porter. Clarke came, accordingly, and, at the end of that period was elected joint minister with Porter. To this election Porter refused to consent, alleging that the congregation had not the power to appoint a co-pastor without such consent. Further disputes and differences were the consequence of this refusal, and, eventually, on the 6th of November, 1828, a church meeting was held, at which it was resolved that Porter should be no longer the pastor, and that the defendant, Clarke should, from that time, be the sole pastor, and, on the following Sunday, Porter was forcibly prevented from entering the pulpit, and Clarke, the defendant, took possession of it.

There was no endowment for the minister, nor any trust property, except the chapel and premises, nor was the minister paid by the pew rents, but, solely, by the voluntary contributions of persons attending the chapel.

count for all the profit of it, but in order to reach that profit when it is not otherwise ascertained, they adopt the very rule of computation contained in the report before us," which he sanctioned. *Schieffelin v. Stewart*, ubi supra. See further *Clay v. Hart*, 7 Dana, 495. *Thomas' executor v. Frederick County School*, 9 Gill & John. 115. A trustee, under an assignment fraudulent and void, though a creditor was ordered to account for all the property received under the assignment with interest, deducting his commissions and costs, and to come in rateably with the other creditors. *Riggs v. Murray*, 2 Johns. Ch. Rep. 582.

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 1829.—Porter v. Clarke.
 

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The bill was filed by Porter, by the trustees of the chapel, and by two of the members of the congregation, on behalf of themselves and all other the members except such as were made defendants, against Clarke and nine of the members by whose orders Porter had been forcibly expelled. It prayed that the trusts upon which the premises were held, might be ascertained and declared, and carried into execution by and under the direction and decree of the court, so far as it might be deemed proper or necessary, and that a sufficient number of proper persons might be appointed new trustees in [\*522] the room of such as were dead, or desirous of being \*released from the burden of their trust, and that it might be declared that Porter was the lawful pastor and minister of the chapel and congregation, and that he might be quieted in the possession of such rights as appertained to him in that capacity: and, also, that the defendant Clarke, might be restrained by the injunction of the court, from performing the duty of pastor or minister of the chapel and congregation, or officiating or performing divine worship in the chapel, and that he, and the other defendants, might be restrained, in like manner, from impeding, or, in any manner, interfering with Porter in the exercise of his duties as pastor and minister thereof.

A motion was now made, for an injunction in the terms of the prayer. In support of the motion, numerous affidavits made by dissenting ministers of this denomination were read, who all agreed that, when a minister has been duly elected to be pastor of a congregation, and has been ordained according to the form usual amongst them, he holds his office until he thinks fit to decline it; and that no person, or body of persons, has power to remove him, or to appoint a co-pastor with him without his consent.

Mr. *Sugden*, and Mr. *Bellasis*, in support of the motion argued that, where, as in this case, the trust deeds were silent as to the mode of electing ministers, and as to the duration of their office when elected, and where, as in this case also, no custom had yet obtained (the plaintiff being only the second minister,) the minister, when elected, was in for life, and that the congregation had not the power of dismissing him: that, where this court does not find any [\*523] contrary custom established, \*it always leans to construing the tenure of dissenting ministers to be for life: *The Attorney General v. Pearson*:(a) that there could be no doubt that the court had jurisdiction in this case, although there was no endowment, because the chapel itself, and the incidental advantages derivable therefrom, were sufficient to sustain that jurisdiction. *Davis v. Jenkins*,(b) *Leslie v. Birnie*.(c)

Mr. *Bickersteth*, Mr. *Knight*, and Mr. *Lynch*, for the defendants, were stopped by the court.

The Vice-Chancellor said that he had looked into the deed creating the trust, and that he could find no direction as to the mode of electing ministers, or as to the duration of their office when elected; neither could he find that there

(a) 3 Mor. 402.

(b) 3 V. &amp; B. 151.

(c) 2 Rom. 114.

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 1839.—*Waite v. Templer.*


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was any provision made for the minister, by the trust deed ; but that he was dependant, entirely, on the voluntary contributions of the members of the congregation ; and he, therefore, could not see that the plaintiff Porter had made any case for the interference of the court. His Honor added that, independently of the want of jurisdiction, he was of opinion that it was very reasonable that a minister who depended, entirely, upon voluntary contributions, should be dismissible, at will, by the persons so voluntarily contributing.

Motion refused.

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\**WAITE v. TEMPLER.*

[\*524]

1839; 13th, 15th and 20th March.—*Will.—Construction.*

A testator, who had long resided in India, gave a legacy "to T. P. who resided at A. when I left England, or to his heirs, executors, administrators or assigns." T. P. died in the testator's lifetime: Held, that the bequest over was void for uncertainty.

JOHN DUFFY left England for India in 1784, and never returned. In 1810 he made his will, which, after giving annuity, was as follows: "I give one-fifth part of my remaining property to James Templer, Esq., who resided in Bedford Square, Bloomsbury, London, when I left England, or to his heirs, executors, administrators or assigns, for ever. I give one-fifth of my residuary property to the Rev. Mr. Templer, who resided at Lindbridge, near Chudley, in Devonshire, when I left England, or to his heirs, executors, administrators or assigns, for ever. I give one-fifth of my remaining property to Thomas Parlby, Esq., junior, who resided at Stonehouse, near Plymouth, Devonshire, when I left England, or to his heirs, executors, administrators or assigns, for ever. I give one-fifth of said remaining property to cousins Bryan and Benjamin Duffy who resided near Hatherby, Devonshire, when I left England, the said fifth part to be divided equally between them, or to their heirs, executors, administrators or assigns, for ever. I give one-fifth part of my said remaining property to my nearest relations, on my mother's side, by the name of Marriott, which family resided at Melton Mowbray, in Leicestershire, when I left England, or to their heirs, executors, administrators or assigns, for ever."

The testator died at sea, on his return to England, on the 9th of August, 1810, and letters of administration of his personal estate, with his will annexed, were granted to James Templer and John Templer.

\*In Michaelmas term, 1813, a suit was instituted, by Edward Waite, [\*525] and Ann, his wife, against the administrators and certain other persons, for the administration of the assets of the testator. Ann Waite, was the only child and administratrix of George Marriott, who was the brother of the testator's mother, and therefore she claimed to be entitled, in right of her father,



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to the one-fifth of the residue of the testator's estate, given to his nearest relations on his mother's side.

By the decree made on the hearing of the cause, it was referred to the master, to inquire and state whether Thomas Parlby, the younger, survived the testator, or, as the bill alleged, died in his life-time, and when, and who was his personal representative. And the master was, also, ordered to inquire and state who were the testator's nearest relations, on his mother's side, by the name of Marriott, answering the description in the will, at the time when the testator left England, and whether any of them survived the testator, or died in his life-time, and which of them were then living, or had since died, and when, and who were their respective heirs, executors, administrators or assigns.

In pursuance of this decree, the master found that George Marriott, of Sysonby, in the parish of Melton Mowbray, in the county of Leicester, was the nearest relation of the testator, on his mother's side, by the name of Marriott, answering the description in the testator's will, at the time he left England : that George Marriott died in 1788, and that Ann Waite, his daughter and only next of kin, was his personal representative. The master also found [\*526] that the defendant \*Judith Parlby, was the personal representative of

Thomas Parlby the younger. To the master's report made in pursuance of this decree, some of the defendants, who were afterwards found to be some of the testator's next of kin, took exceptions; and upon the cause coming on to be heard as to the exceptions and for further directions, it was referred back to the master to inquire and state who were the testator's next of kin at his death, and who were the representatives of such of them as had since died, and, also, who was the nearest relation of the testator, on his mother's side, of the name of Marriott, living at the death of the testator. (which family resided at Melton Mowbray, in Leicestershire,) other than a person or persons taking that name by marriage. And the master was to advertise for the next of kin of the testator, living at his death, and for the personal representatives of any of them that had since died.

The master reported that the defendants, Bryan Dufty and Benjamin Dufty, the nephews of the testator on the part of his father, and Ann Waite, the wife of the plaintiff Edward Waite, (to whom she was married in February, 1787,) and Sarah Marriott, and Mary Baguley, (whose maiden names were Voce, and who were the nieces of the testator on the part of his mother,) were the next of kin of the testator, living at his decease, and that all of them were still living, except Sarah Marriott, and that William Marriott, her husband, was her personal representative: and the master further reported that it did not appear to him that the testator had any relation, on his mother's side of the name of Marriott, living at his death, and then having that name, the said Sarah [\*527] Marriott having acquired that \*name by marriage with William Marriott, who was not related to the testator, and Ann Waite having lost the name of Marriott by her marriage with the plaintiff Edward Waite, in the life-time of the testator.

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On the cause again coming on for further directions, it was referred back to the master to inquire and state who were the next of kin of Thomas Parlbby the younger, living at the respective deaths of Thomas Parlbby, the younger, and the testator, and who were the personal representatives of such of them as had since died.

The master found that Thomas Parlbby the younger died on the 6th of March, 1798; that the testator died on the 9th of August, 1810; that Thomas Parlbby, the father of Thomas Parlbby the younger, was the only next of kin of his son living at his son's decease; that Thomas Parlbby, the father, died in 1802; and that George Templer and John Alexander Parlbby, were his personal representatives. And the master also found who were the next of kin of Thomas Parlbby, the son, living at the death of the testator.

Ann Waite, having died after the first decree, the suit was revived, by the plaintiff, as her husband and personal representative. He also filed a bill of supplement against the personal representatives and next of kin, both of the testator and of Thomas Parlbby, the father, and also against the personal representative of Thomas Parlbby, the younger, and his next of kin at the testator's decease; and, also, against Wm. Marriott, and Wm. Baguley and Mary his wife, stating that he, the plaintiff Edward Waite as the personal \*representative of Ann Waite, his late wife, was entitled to one-fifth [\*528] part of the residue of the testator's estate, the said Ann Waite, having been the nearest relation of the testator, on his mother's side, answering the description in the will, and praying for the same relief as his late wife and he, the plaintiff, in her right, would have been entitled to if she had been living. The next of kin of Thomas Parlbby the younger, at the testator's death, claimed, the fifth share of the estate, which was bequeathed to Thomas Parlbby the younger, or to his heirs, executors, administrators or assigns. The same share was also claimed by the personal representatives of Thomas Parlbby the elder, who was the sole next of kin to Thomas Parlbby the younger, at his death.

Mr. *Pepys*, and Mr. *Barber*, for the plaintiff, argued that Geo. Marriott, the father of the plaintiff's late wife, was the person who answered the description of the testator's nearest relation on his mother's side, by the name of Marriott, &c., and that that individual, if he had been living at the testator's death, would have been entitled to one-fifth of the residue; but, if he were then dead, that the person who then represented him by legal succession, was entitled to it, and that that person was the late wife of the plaintiff, she being both the heir and personal representative of her late father, Geo. Marriott. *Sibley v. Cook*, (a) *Corbyn v. French*, (b) *Bridge v. Abbott*, (c) *Saunders v. Franks*. (d) But that, if the court should decide that the share of the residue, which the plaintiff claimed, was undisposed of, he, in right of his wife, who was one

(a) 3 Atk. 572.

(b) 4 Ves. 418.

(c) 3 Bro. C. C. 224.

(d) 2 Mad. 147.

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[\*529] \*of the next of kin of the testator, would be entitled to a distributive share of it.

Mr. *Sugden*, for some of the testator's next of kin, contended that the question which had been argued, was concluded by the inquiries which had been directed subsequently to the first decree.

The VICE-CHANCELLOR:—In all the cases that have been cited in support of the plaintiff's claim, there was a person who was, originally, sufficiently described; for no person can take by substitution, under the words "heir, executors, administrators, or assigns," unless it is found that there was some one answering the description of the original legatee at the date of the will. Now here the testator has given one fifth part of his remaining property to his nearest relations, on his mother's side, by the name of *Marriott*, and proceeds to say, "which family resided at *Melton Mowbray*, in *Leicestershire* when I left *England*." It is impossible to read this clause, without perceiving that the testator meant to annex the time of his leaving *England* to the residence of the family at *Melton Mowbray*; and if so, there is no *propositus*, and consequently there can be no substitute; and, therefore, this share of the residue belongs to the next of kin.

The other question that was argued in this cause, was who had become entitled under the bequest to *Thos. Parlby*, the younger, or to his heirs, executors, administrators or assigns.

Mr. *Horne* and Mr. *Stephenson*, for *Judith Parlby*, the personal [\*530] representative of *Thomas Parlby*, the younger:—"The testator, when he made his will, did not know whether his friends, in *England*, were living or dead. He meant to give a bounty to those friends, if they were living, and, if they were dead, then to those who were standing in their place. The court cannot strike out of the will the words: "or to his heirs, executors, administrators or assigns." If *Thos. Parlby*, the younger, were living, at the death of the testator, those words were unnecessary, as the gift of personalty to any one, is the same as a gift to him and his heirs, executors, administrators and assigns, and, therefore, those words mean nothing, if they do not mean what we are contending for. The testator clearly intended to substitute, for *Thos. Parlby*, the younger, if he should be dead, those persons who, by the law of *England*, might stand in his place. In *Tidwell v. Ariel*,<sup>(e)</sup> the Vice-Chancellor says: "it is said that this direction is inconsistent with a mere personal gift," &c.

The Vice Chancellor:—That case is against you, as I read it.

Mr. *Sugden*, for some of the next of kin of the testator, here referred to *Corbyn v. French*,<sup>(f)</sup> and *Bone v. Cook*,<sup>(g)</sup> upon which Mr. *Horne* remarked, that in *Corbyn v. French* the testator had no doubt as to whether the individual was alive.

(e) 3 Madd. 403, see Judgment, 409.

(f) 4 Ves. 418.

(g) 13 Price, 332.

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Mr. *Pemberton*, for some of the next of kin of Thomas Parlbey, the younger, at the death of the testator :—“Where a bequest is [\*531] made to an individual named, it is a proof that the testator supposed that he was alive, and intended a personal benefit to him, and, if he dies in the life-time of the testator, the legacy lapses. When that is so, the courts have held that the words “and his executors and administrators” are words of limitation and not of substitution. But this principle does not apply, where the bequest is to A. or his executors, &c. Because it then appears that the testator contemplated that either the one or the other, and not both, should take. Accordingly, in all the cases, the word “or” has been held to be substitutional, unless the effect is controlled by the context. *Stone v. Evans*.<sup>(h)</sup> Two cases were subsequently decided, which are perfectly consistent with the doctrine that I am supporting, and have established this : that, when there is a bequest to one for life, and, after the death of the tenant for life, to A. or his executors, the executor is substituted only in case A. survives the testator, and dies in the life-time of the tenant for life. This is the principle of *Corbyn v. French*, and *Bone v. Cooke*. So where there is a bequest to A., but payment is postponed, and the payment is directed to be made to A., or his executors, &c. the executor is substituted only if the legatee, having survived the testator, dies before the time of payment. *Tidwell v. Ariel*. All these authorities show that the word “or” is a word of substitution, and that the only question is as to the event on which the substitution is to take place. These cases, and particularly the last, prove that, if the bequest is to take effect at the death of the testator, the substitution must have reference to the death of the legatee in the testator’s life-time. Then, if \*this is the general rule where [\*532] a bequest is made to a legatee known to be alive, how much stronger is it, if it appears that the testator, at the time when he made his will, was ignorant whether the legatee were living or dead. The reason for using the words of substitution, is then apparent. Upon the face of this will, the testator expresses himself as doubtful whether the legatees were living or dead. It is clear that he had heard nothing of them since he left England ; as he describes them as living at particular places when he left England. He had gone to India twenty-four years before the date of his will. Is it probable that, of five individuals, all of whom had establishments of their own when he left England, some at least, should not be dead ?

Now if “or” be substitutional, as every one of the cases that I have cited proves, is there any period or event to which it can refer, in this case, except the legatee being dead at the death of the testator ? In what event can the executors be substituted, except in the event of the legatee being dead at the death of the testator. The circumstance of substituting the executors, shows that the contingency is the death of the legatee. In order to hold that the words “heirs, executors,” &c. are words of limitation in this case, the court

(h) 2 Atk. 86.

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must first change "or" into "and," and then expunge all the words of limitation as surplusage. It may be said that the word "or" makes the bequest uncertain, and, therefore, void. But there is no uncertainty in this case. The legacy is to take effect at the death of the testator. There cannot be two classes of persons who will then be entitled to claim it. If the legatee is alive at the testator's death, there can be no heirs, executors or administrators. In [\*533] that case he will take: if, on the \*other hand he be then dead, his representatives will take. There can be no competition between two claimants, as in the case of a gift to A. or B. So a bequest to A. or his assigns, creates no uncertainty, as there can be no assigns of the legatee in the life-time of the testator. In *Bridges v. Cook*,<sup>(i)</sup> it was decided that the words "legal representatives," were words of substitution, and that there was no uncertainty in them. The words "heirs, executors," &c. here mean next of kin at the testator's death.

Mr. *Bacon*, for another of the next of kin of Thomas Parlbby the younger, living at the testator's death, also contended that was a case of substitution, and that the bequest had not failed.

Mr. *Sugden*, and Mr. *Mathews*, for some of the next of kin of the testator:—The general rule is that a bequest to a person who dies in the life-time of the testator, whether it is to him simply, or to him and his executors, is lapsed. There is another rule, which is laid down in *Sibley v. Cook*, that, if a person gives a legacy, and means that, if the legatee dies in his life-time, some one else should take it, he must not only manifest that intent, but must point out the person who is to take in that event.

It has been argued that this must be considered as a case by itself, as the testator has indicated that he was ignorant whether the object of his bounty were living or dead. I concede that he was ignorant whether the legatee were living or dead, when he made his \*will. But does it necessarily follow, therefore, that the gift over to other persons, whom he has not described, so that the court can say who they are, is to take effect? It is clear that, in the gift over, the testator had no particular objects of bounty in view. It only appears that he intended that the share of the residue should go to Parlbby's estate, and, therefore, to pass a transmissible interest to his real or personal representatives. If so, it is nothing more than a bequest to a man and his executors; and, therefore, it is a case in which the bequest fails.

Next, as to the uncertainty of the gift over. Suppose that the testator did not intend that the bequest should fail, and had other persons in view to whom it should go, how is the court to put a construction upon the words used in the gift over. In *Bridge v. Abbott*, *Evans v. Charles*,<sup>(k)</sup> and *Vaux v. Henderson*,<sup>(l)</sup> there was only one set of words used, descriptive of one set of persons, not, as here, where four classes of persons are named. In the first of those cases,

(i) 2 Vern. 378, in note. See 1 Roper. Leg. 403, et seq.

(k) 1 Anst. 128.

(l) 1 Jac. & Walk. 388.

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the words "legal representatives" were used, and they were held to mean next of kin. In the next, the words were, "personal representatives," and they were held to mean the administratrix. In *Vaux v. Henderson*, a gift over to the heirs of the original legatee, was construed as a gift to his next of kin. So in *Bridges v. Wood* and *Price v. Strange*,<sup>(m)</sup> the only words were, "legal representatives;" and, on those words, the whole of the difficulty and contest arose. Upon the whole, we submit that the testator has shown that he "intended that this share of the residue should go as a transmissible [\*535] interest, and that the heirs, &c. of Parlby should take in their representative character only; or, at all events, that the gift over is void for uncertainty, as the words do not describe any particular class of persons.

Mr. *Teed*, for others of the next of kin of the testator:—Either the bequest to Thomas Parlby has failed by his death in the testator's life-time, or, the gift over is void for uncertainty. The description, "who resided," &c. was merely intended to designate who the legatee was, and not to show that any other persons should make, if he died in the testator's life-time. In *Toplis v. Baker*,<sup>(n)</sup> the C. B. says: "Now, no rule is more established than that," &c. On the authority of *Corbyn v. French*, and *Bone v. Cooke*, the words "heirs," &c. are surplusage, but if not, the gift over is void for uncertainty.

The VICE-CHANCELLOR:—As the testator has used the word "assigns," the question is, whether he did not contemplate that the legatee would survive him.

Mr. *Barber* for the plaintiff:—It is the interest of the plaintiff now to contend that the bequest to Parlby has failed. There are two questions to be decided: whether this is not a gift to Parlby and his heirs, &c., and, if not, then who is to take under the words of substitution.

\*The court has no guide to enable it to discover who the substituted [\*536] persons are. The word "heirs" may mean either children or personal representatives. A legatee cannot have both executors and administrators, and they cannot take as joint-tenants.

Mr. *Pemberton*, in reply:—It has been said that the words "heirs, executors," &c. in this case, are words of limitation, and not of substitution, but if they are words of substitution, then that they are void for uncertainty. It has been admitted that there is not a single authority that applies, directly, to this case; and it has been only said that we are not able to produce an authority in support of our claim. But we have *dicta* in our favor. In *Tidwell v. Ariel*, the Vice-Chancellor says? "If the direction had been that the respective legacies should, at his death, be paid to the legatees of their respective heirs, the inconsistency contended for would have existed; but a payment to the representative at the end of a year after the testator's death, if the legatee be not then living, is not inconsistent with a personal gift to the legatee." The rule upon which the court acts, in holding a legacy to be lapsed, cannot be said to

<sup>(m)</sup> *Madd. & Geld.* 159.<sup>(n)</sup> 2 *Cox*, 118; see p. 120, 121.

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apply to a case where it is apparent, on the face of the will, that the testator was ignorant whether the legatee were living or dead at the date of his will.

Next, as to the uncertainty of the bequest over—every one of the cases that have been cited is an authority for me: for, in every one of them, the court has said that it would put some construction upon the words, “heirs, [\*537] executors,” &c. and not that they were <sup>so</sup> uncertain that it would put no construction at all upon them. In a bequest to poor relations, the court has said that it would cut the knot, and take the statute of distributions for its guide, as it cannot decide who are the poor relations.

It has been said that, in this case, there are four classes of persons, who may claim under the bequest over. Now, as to assigns, there can be none unless the legatee survives the testator; and, if there is an executor, there can be no administrator. Would then a bequest to the heirs or executors of the original legatee be void? Now it is settled that the word “heirs,” when used as to personal estate, always means next of kin. *Holloway v. Holloway*, (o) and *Henderson v. Vaux*. In *Long v. Blackall*, (p) the same construction was adopted. In *Lowndes v. Stone*, (q) there was a bequest to the testator’s next of kin or heir at law: and the court held that the next of kin took. There was as much doubt in that case, as there is in this. The word “Executors,” is, in this case, synonymous, in effect, with the word “heirs,” for the executors will be trustees for the next of kin. If the court should think that it is doubtful who the persons are, who were intended to take under the bequest over in this will, it will adopt the safe rule of the statute of distributions, and give this share of the residue to the next of kin of Thomas Parlbby living at the testator’s decease.

Mr. *Ellis*, and Mr. *Wood*, for the executors of Thomas Parlbby the younger, asked for their costs.

[\*538] \*THE VICE-CHANCELLOR:—The question that I have to decide in this case, arises upon the following clause in the will of John Dufty: ‘I give one-fifth of my remaining property to Thomas Parlbby, Esq. junior, who resided at Stonehouse, near Plymouth, Devonshire, when I left England, or to his heirs, executors, administrators or assigns, for ever.’

It appears that the testator left England, in 1784. Thomas Parlbby the younger died in 1798, and left his father, his only next of kin at his death. The testator died in 1810, and this share of the testator’s residuary estate is claimed by the personal representatives of Thomas Parlbby the elder, who was the next of kin of the legatee at his death, and also by certain persons who were the next of kin of the legatee, at the death of the testator: and, in support of the latter of these claims, it is insisted that the same construction ought to be put upon this clause, as if the gift had been to Thomas Parlbby the younger, or his next of kin. If that were so, I should have to decide a point which was never before decided in terms.

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It is quite clear that a testator may give a legacy to a person, and direct that, if the legatee should die in his life-time, the legacy should go over. It was so decided in *Darrel v. Molesworth*, (r.) In that case there was a gift over in terms completely unambiguous. So, in every case where the legacy was held to be given over, the court felt itself bound, by the terms of the will, [\*539] to declare that the intention of the testator was that the legacy should go over. The cases to which I allude are, *Sibly v. Cook*, *Sibthorp v. Moxom*. (s) *Bridge v. Abbott*, and *Sanders v. Franks*. Now, in *Corbyn v. French*, where a fund was given to the testator's wife for life, and after her decease, a certain portion of that fund was given to four persons, or their representatives or representative, Lord Alvanley, M. R. said: "I will not determine now, because it is not necessary, that, where a legacy is given to a person, or to his representatives, it can mean any thing but in case of his death in the life of the testator: but it is perfectly clear that, where the fund is given to one for life, and, after the death of that person, to several others, and, in case of their deaths, to their representatives, there is no reason to presume an intention that it shall not lapse by the death of the legatee, in the life of the testator." (t) And it is observable that, in the case of *Tidwell v. Ariel*, Sir Thos. Plumer, M. R. thought himself at liberty to hold that the testatrix did not mean the legacy to go over. It does not appear to me that I am under the necessity of deciding the hypothetical case, put by Lord Alvanley, any more than Lord Alvanley was. For, in this case, the testator does not give the share of his residue to Thos. Parlbby, or his next of kin. The words used are very different. If the testator had meant to give the share of his residue over to a person who might claim by reason of the anterior death of Thos. Parlbby, he would have said: "If Thos. Parlbby be now dead, or shall die in my life-time, then I give the share of my residue before bequeathed to him, to A. B." There is, however, \*nothing on the face of this will to show that the testator con- [\*540] templated either of those contingencies. And, in this case, I am called upon to put a construction upon this will, as if the said testator had said: "I give one-fifth of my remaining property to Thomas Parlbby, or his next of kin." I am, therefore, called upon to strike out of the will the words that I find in it, and to substitute words that are totally different. I am called upon to say that the testator meant next of kin, when every word that he has used shows that he meant something else: for next of kin are not heirs, executors, administrators, or assigns. My opinion is that I am not authorized, by any decided case, to put any such construction upon this bequest.

It has been said that the court has construed the word "heirs" to mean "next of kin," but it has never construed the words, "heirs, executors, administrators or assigns," to mean "next of kin." In *Stone v. Evans*, the words of the gift over were the same as they are in this case, but Mr. Justice Wright gave no opinion upon the meaning of those words, and their meaning

(r) 2 Vern. 378.

(s) 3 Atk. 580.

(t) See 4 Ves. 435.



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was not argued, and it was merely decided that as the residue was given to the testator's sister, as executrix, and she died in the testator's lifetime, her administrator could not take. In *Lowndes v. Stone*, the testator used these words: "the remainder and residue of my estate (if any) and effects of what nature soever and wheresoever, which I shall, at my decease, be seised or possessed of or entitled unto or interested in, I give next of kin or heir at law; and the court ordered distribution to be made according to the statute. The bequest, therefore, was held to be void; for, it [\*541] had been held to be a good bequest to the next of kin, they \*would have taken as joint tenants; and therefore, the court, in effect, declared that the bequest was void. In *Holloway v. Holloway*, the testator gave 4,000*l.*, in trust for such person or persons as should be his heir or heirs at law. There only one description of persons was spoken of: and Lord Alvanley, M. R. said: "If I was under the necessity of deciding this point, I must hold it heirs *quoad* the property; that is, next of kin. But I am relieved from that; as, if heirs at his death are meant they are the same persons; the three daughters being both heirs and next of kin; and, if they did not take as heirs at law they took an absolute interest in themselves in the personal estate. Great difficulties would arise from the construction that heirs at law are intended, and applying it to personal property. He might have different heirs at law; heirs descending from himself as first purchaser; heirs *ex parte paterna*, and *ex parte materna*."(*u*) It is observable, therefore, that the court did not decide that "heirs" meant next of kin. In *Vaux v. Henderson*, before Sir W. Grant, the words were: "I give and bequeath, to Mr. Edward Vaux, senior, of Austin Friars, London, merchant, 200*l.* and failing by decease before me, to his heirs." The M. R. held that the 200*l.* belonged to the next of kin of Vaux at the death of the testator. But, in that case, there was only one single description of persons mentioned in the bequest over. In *Gwynne v. Muddock*,(*x*) there was a gift of both real and personal estate to Ann Williams, during her life, and the testator's next heir was to enjoy the same after her death; and Sir W. Grant said that there was no doubt [\*542] that the heir at law, properly and technically speaking might \*take personal property bequeathed to him by that description. These cases show that the word "heir" when used in bequeathing personal estate, may mean *persona designata* as heir, or that it may not mean so. But here there are four descriptions of persons mentioned. When the testator used the word "assigns" he contemplated some person who might derive title by an act of the legatee; and when he used the word "heir" he described a person who could not take by the act of the legatee. And to these two words the testator has added "executors and administrators. My opinion therefore is that the bequest over is totally void for uncertainty.[1]

(*u*) See 5 Ves. 403.(*x*) 14 Ves. 488.

[1] A testator gave to the children of his late sister, whose names he enumerated, "or to their heirs," certain legacies, and three of the children died in the life-time of the testator: it was held that

1829.—Wontner v. Wright.

\*WONTNER V. WRIGHT.

[\*543]

1829; 16th March.—Costs.—Incumbrances.

A first incumbrancer having a power of sale, but having lost the title deeds, institutes a suit to have the estate sold, the subsequent incumbrancers are entitled to be paid their costs, although the proceeds of the sale are not sufficient to pay what is due to the plaintiff.

THE plaintiff was a mortgagee of a real estate, with a power of sale. There were other incumbrances upon the property, all of which were subsequent to the plaintiff's mortgage. The plaintiff had lost the title deeds of the estate, and on that account was under the necessity of instituting the suit, for the purpose of having the estate sold under the decree of the court. The estate was sold accordingly, but the proceeds were not sufficient to pay the principal and interest due to the plaintiff. Upon the cause coming on for further directions, the question was, whether the subsequent incumbrancers were entitled to be paid their costs out of the purchase money.

Mr. Roupell, for the plaintiff.

Mr. Knight, for one of the subsequent incumbrancers, cited *Kenebel v. Scrafton*, (a) and *White v. The Bishop of Peterborough*. (b)

Mr. Martin, and Mr. Spence, appeared for the other subsequent incumbrancers.

The Vice-Chancellor directed that the subsequent incumbrancers should be paid their costs out of the proceeds of the sale of the estate. [1]

(a) 13 Ves. 370.

(b) Jac. Rep. 402.

the legacies to these children did not lapse, but that their next of kin took by substitution at the death of the testator. He also gave all the residue of his property "in equal shares to each of his sisters M. S. and S. G., and upon their deaths respectively to their heirs;" both sisters died in the life-time of the testator: it was held that the next of kin of M. S. and S. G., living at the death of the testator were entitled by substitution to the gift of the residue. *Gittings v. McDermott*, 2 Myl. & K. 69. A bequest to A. who was dead at the date of the testator's will, having bequeathed his property, or his legal representatives; it was held that A's next of kin according to the statute of distributions were entitled to the fund. *Cotton v. Cotton*, 2 Beav. 67.

[1] Vide *Mackie v. Cairns*, 5 Cow. 547. 563. Where the rights of the several junior incumbrancers are truly set forth in the bill of foreclosure and the mortgagor pays the complainant's debt and costs, before any decree in the cause, he may discontinue without paying the costs of the junior incumbrancers, their appearance and answer being unnecessary. *Merchants Insurance Company v. Marvin*, 1 Paige, 557. If a defendant against his better knowledge, sets up an unjust defence, and puts the complainant to extra costs when the premises are insufficient to pay the whole amount, such extra costs ought to be charged on the defendant personally. *Park v. Peck*, 1 Paige. 477. Where there are two distinct mortgages upon the same property held by two distinct mortgagors, the costs of two bills of foreclosure will not be allowed, as the rights of all the parties might be settled by a decree in a single suit: but in this instance both bills were filed by the same solicitor. *Wendell v. Wendell*, 3 Paige. 509. 2 Hoff. Ch. Pract. 78. Where the widow of the mortgagor is a party to a bill of foreclosure, and answers and submits to the decree of the court, her costs are to be paid out of the two thirds of the fund remaining after deducting the third to which she is entitled as her equitable dower. *Tabele v. Tabele*, 1 Johns. Ch. Rep. 45.

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[\*544]

\*FERNANDEZ v. CORBIN.

1829; 19th March.—*Subpœna*.—*Attachment*.

An attachment for non-appearance to a subpœna served in Guernsey, is irregular.

THE defendant had been served with a subpœna, in the island of Guernsey, but did not pay obedience to the writ. The plaintiff's clerk in court having declined to issue an attachment against the defendant, for want of appearance, on the ground that the subpœna had been served in Guernsey, the Vice-Chancellor, on the 9th of December, 1828, ordered, upon an affidavit of the service of the subpœna, that the clerk in court should be at liberty to issue the attachment. It did not appear that the defendant had been within the jurisdiction of the court since the subpœna was served.

Mr. *Campbell*, for the defendant, now moved that the order for the attachment might be discharged, for irregularity. He referred to *Bourke v. Lord Macdonald*,<sup>(a)</sup> *Scott v. Hough*,<sup>(b)</sup> *Shaw v. Lindsay*,<sup>(c)</sup> and said that those cases were no authority for making the order now sought to be discharged, as it appeared, from the registrar's book, that no orders were made in them :<sup>(d)</sup>

that the last case was *Nichol v. Gwyn* :<sup>(e)</sup> but that there was this [\*545] specialty in that case ; \*the defendant's solicitor had acknowledged the service of the subpœna, and had undertaken to appear.

Mr. *Whitmarsh*, for the plaintiff.

The Vice-Chancellor said that he had expressed a doubt as to the propriety of making the order for the attachment, when it was applied for, and that that doubt was now confirmed.

Order discharged without costs.

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KING v. TURNER.

1829; 18th March.—*Copyhold*.—*Vendor and Purchaser*.—*Infant Trustee*.

A copyhold estate will not pass by the will of a devisee who dies before admittance.

A copyholder covenants to surrender to trustees in trust to sell, and dies before surrender, leaving an infant heir, the covenantors agree to sell the estate, and afterwards file a bill for a specific performance : held, that the heir is not an infant trustee within 6 Geo. 4, c. 74, and therefore cannot be ordered to surrender immediately ; and the bill was dismissed with costs.

By an indenture, dated the 20th of June, 1814, made between George Green, of the first part, Mary Green, the mother of George Green, of the second part ; Richard Challen, and the several other persons whose names were thereunto subscribed and seals affixed, (creditors of George Green,) of the third part ; and the plaintiffs, of the fourth part ; after reciting that

(a) 2 Dick. 587.

(b) 4 Bro. C. C. 213, see Mr. Bell's note.

(c) 18 Ves. 496.

(d) In the note to *Shaw v. Lindsay*, in the second edition of Mr. Vesey's reports, it is stated that the order applied for in that case was finally refused, the cases cited proving to be misreported.

(e) Ante, 1st vol. 389.

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1829 —King v. 'Turner.

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George Green was indebted unto the said creditors, in the several sums of money set opposite to their respective names, at the foot of the indenture, which he was then unable fully to pay; and that he was seised in fee of one undivided moiety of a copyhold farm, holden of the manor of Bury, subject to the bench or other estate or interest of Mary Green therein, which, he had agreed to surrender, to the plaintiffs, being trustees apointed on behalf of themselves and all other his \*creditors parties thereto, upon the trusts [\*546] thereafter expressed: It was witnessed that, in pursuance of the agreement, George Green, for himself, his heirs, executors, and administrators, and Mary Green, for herself, her heirs, executors and administrators, did thereby severally covenant with the plaintiffs, their heirs, executors and administrators, that he, George Green, would immediately, or as soon as conveniently might be after the execution of the indenture, procure himself to be admitted tenant, according to the custom of the manor, of the undivided moiety of the farm; and that, immediately after such admission, George Green and Mary Green, would surrender the same undivided moiety to the use of the plaintiffs, their heirs and assigns, or to the use of such other person or persons as he or they should direct or appoint, upon trust, as soon as conveniently might be after the execution of the indenture, to sell and dispose thereof, and to apply the money produced by the sale, in the manner therein mentioned.

George Green made his will, which was, in part, in the following words: "Whereas being entitled to the copyhold messuages, farms and lands, called the Hoe Land and Hoe Green, upon which I now reside subject to the life interest of my mother, I some time ago covenanted to surrender the same, to trustees, for the benefit of my creditors, on condition that the sum of 700*l.* was secured by the bond of the said trustees, the interest whereof, during my mother's life, was to be paid to her: I give and devise all the said copyhold messuages, farms and lands, with their appurtenances, called the Hoe Land and Hoe Green, unto my friend John Salter, his heirs and assigns, \*upon trust, and I declare and direct that it shall and may be lawful, [\*547] to and for the said John Salter, his heirs and assigns, for the purpose of carrying my said covenant into effect, at the request, costs and charges of the said trustees, to enter into and execute all necessary contracts, agreements, assignments, surrenders and assurances, of the same premises, to them the said trustees, or as they shall direct."

George Green died in 1819, never having been admitted to the copyhold estate, leaving the defendant, Jane Watts Green, an infant, his only child and customary heir, and leaving John Salter him surviving. John Salter afterwards made his will, but did not accept the trust estate. He died in 1820, and left the defendant, Henry Salter, an infant, his youngest son and heir according to the custom of the manor.

The plaintiffs having agreed to sell the estate to the defendant, John Turner, this suit was instituted to compel a specific performance of the agreement.

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The question was, whether the plaintiffs could make or procure to be made a good surrender of the estate to the purchaser.

The cause came on to be heard on the 20th of November, 1824; and, by the decree then made, it was declared that the agreement ought to be specifically performed, provided a good title could be made to the estate; and it was referred to the master to inquire as to the title. The master reported in favor of the title.

On the cause coming on for further directions, it was ordered that [\*548] the master's report should be confirmed, and that the plaintiffs, and the defendant, Mary Green, and all necessary parties, should join, as the master should direct, in conveying and surrendering the premises to the defendant Turner. And it was ordered that the defendant, Jane Watts Green, should join in such surrender.

Previously to the hearing it had been agreed, between the parties, in order to avoid expense, that the question whether the plaintiffs could procure a conveyance or surrender of the estate, should be submitted to the court, in the same way as if exceptions had been taken to the master's certificate approving of a conveyance, and the cause had been set down on the exceptions and further directions; but that point was omitted to be then stated; and the cause was thereupon again mentioned to the court. on this point alone, on the discussion of the minutes of the last mentioned order.

Mr. *Horne*, and Mr. *Pemberton*, for the plaintiffs. Mr. *Sugden*, and Mr. *Jacob*, for the defendant.(a)

The VICE-CHANCELLOR:—In *Smith v. Triggs*,(b) Jane Day was the customary heir of Jane Triggs. Jane Triggs had surrendered to the use of her will, and devised to Jane Day, in fee; and the court held, that Jane Day took by descent: and Jane Day, before admittance and without surrender to the use of her will, devised to the defendant. The court said: "There is no title

in him, for want of an admittance of Jane Day, and, also, for want of a [\*549] surrender to the use of her will."(c) And Sir Thomas Plumer, in

*Wainwright v. Elwell*,(d) referring to *Smith v. Triggs*, says: "An heir at law cannot, before admittance, devise a copyhold descended to him." In p. 636, Sir. T. Plumer takes notice of both points. *Doe v. Vernon*,(e) has no reference to the case of an heir. See *Brown's case*.(f) which supposes that, if the heir surrendered before admittance, the lord is satisfied of his fine.

The statute 55 Geo. 3, c. 192, seems to apply to those cases only where a surrender alone would have made good the will, *Doe v. Bartle*,(g) and not to cases where a surrender and something else are necessary; and the 2d section of the act supposes the fee on the admission of the surrenderee only to be payable; and not the fee on the admission of the surrenderor, to be also payable. The conclusion that I come to, is that this title is bad.[1]

(a) The reporter had no note of the arguments.

(b) 1 Str. 487.

(c) See p. 489.

(d) 1 Madd. 632.

(e) 7 East, 8.

(f) 4 Rep. 226.

(g) 5 B. & A. 492.

[1] Vide *Phillips v. Phillips*, 1 Myl. & K. 649.

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It having been held that the legal estate in the copyhold did not pass by G. Green's will, but descended to his heiress at law, who was an infant, it was argued, for the defendant, that, as the property was vested in George Green, subject only to a covenant by him to surrender to the plaintiffs, this covenant did not render either him or his heiress a trustee, in the same way as if there had been an \*express declaration; that the infant heiress was [\*550] only a constructive trustee, and, therefore, could not be ordered to convey under the statute 6 Geo. 4, c. 74; that, consequently, the plaintiffs could not procure a conveyance at present, and the bill must be dismissed.

Mr. *Horne* and Mr. *Pemberton*, for the plaintiffs, submitted that a constructive trustee was within the new statute 6 Geo. 4, c. 74, the language of which varied from the 7 Anne, c. 19, (leaving out the word "only"); that here the infant heiress was a party defendant to the suit, and the decree had declared that the contract ought to be performed, which decree bound the infant; and that, even if the statute did not apply to a constructive trustee, still it would apply to an infant declared to be a trustee by a decree in a cause: that, if a conveyance could not be obtained at present, the bill ought not to be dismissed; but the conveyance only respited till the infant came of age: that the delay had arisen from the defendant's conduct; as the contract was made in 1814, and George Green did not die till 1819; that in the interval, there would have been no difficulty in making a conveyance, and that the defendant ought not to escape from the contract by an accident occurring from his own laches and default.

Mr. *Sugden* and Mr. *Jacob*, for the defendant, said that the delay was on the part of the plaintiffs, who did not file the bill till 1821, and that the Lord Chancellor had decided in *Dew v. Clarke*,<sup>(a)</sup> that a constructive trustee was not within the late statute: and that, in *Bentham v. Wiltshire*,<sup>(b)</sup> [\*551] the plaintiffs were not able to procure a conveyance to be executed, and the bill was dismissed with costs. *Bullock v. Bullock*,<sup>(c)</sup> and *Holland v. Hill*,<sup>(d)</sup> were also cited.

The Vice-Chancellor said that he always considered that the statute of Anne did not apply to constructive trustees; [1] that the late act 6 Geo. 4, c. 74, did not, as he conceived, apply: that the only distinction was that the late statute extended to infant trustees having an interest, and to cases where there were executory trusts to be performed; that the circumstance of there being a decree did not make any difference; because a decree declaring an infant to be a trustee, must give him a day to show cause, when he came of age, and could only direct him to convey when he should come of age, unless he should show cause against it: a decree, therefore, could not enable the court to direct him to convey before he came of age, and, therefore, could not make him a trustee within the statute. The consequence was, that the plaintiffs could not now procure a conveyance, and, therefore, the bill must be dismissed with costs.<sup>(e)</sup>

(a) 4 Russ. 511.

(b) 4 Madd. 44.

(c) 1 Jac. & Walk. 603.

(d) Sugd. Vend. 323.

(e) See 1 Will. 4, Chap. 60.

[1] Vide 2 R. S. (2d Ed.) 190. § 173, 174.

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[\*552]

\*GOLEBORN v. ALCOCK.

1829; 21st March.—*Landlord and Tenant.—Outstanding Term.*

Testator devised, an estate to several persons for their lives, successively, with power to grant leases, under certain restrictions. The first tenant for life grants a lease to a person who had no notice of the power, or that the lessor was tenant for life only. A subsequent tenant for life brings an ejectment against the lessee, on the ground that the lease was not made according to the power. The court will not prevent the lessee from setting up an old outstanding term created by the testator.

WILLIAM CHILWELL, Esq., deceased, devised all his freehold estates, unto Joseph Waring and Maurice Swabey, and their heirs, to the use of his niece dame Elizabeth Mawbey, the wife of Sir Joseph Mawbey, for life, with remainder to the use of Sir Joseph Mawbey, for life, with remainder to the use of Waring and Swabey, for the term of 500 years, with remainder to the use of Joseph Mawbey, Esq., with remainder to the use of his first and other sons, successively, in tail general, with remainder to the use of trustees, for the term of 1,000 years, with remainder to the use of the plaintiff Catherine Goleborn, then Catherine Mawbey, for her life, with remainder to the use of the first and other sons of Catherine Goleborn, successively, in tail general, with remainder to the use of the testator's right heirs; and by the will, power was given to Sir Joseph Mawbey, and dame Elizabeth his wife, and the survivor of them, and, after both their deaths, to Joseph Mawbey and Catherine Mawbey, when they should respectively be in the actual possession of the estates, to lease such part of the estates as should be fit for the purpose of having houses and buildings erected thereon, for 61 years, in possession, at the most improved yearly rent, and so as in such leases there were contained all proper covenants on the part of the tenants thereof, for laying out reasonable sums of money in erecting, finishing, and completing good and substantial houses thereon, and for keeping the same in good repair.

[\*553] \*Dame Elizabeth Mawbey died in the testator's lifetime.

The testator died in the year 1795; and, upon his death, Sir Joseph Mawbey entered into possession of the estates. He died in June, 1798; and, thereupon, Joseph Mawbey, Esq., who, upon the death of his father, became Sir Joseph Mawbey, Bart. entered into possession of the estates. He died in August 1817, without issue male; and, thereupon, the plaintiff, Catherine Goleborn, the next devisee in the will, became entitled to the estates.

The plaintiffs, Thomas Lynch Goleborn and Catherine his wife, discovered that Sir Joseph Mawbey the elder had granted a lease, dated the 1st of May, 1798, to Richard Hernishaw, of part of the estate, for a term of sixty-one years, which Sir Joseph Mawbey had not any power to do, inasmuch as such lease was not of any part of the premises for the purpose of having houses and buildings erected thereon, and did not contain any covenant to erect any houses or buildings upon any part of the demised premises. Accordingly they, in 1825, caused an ejectment to be commenced against the tenant in possession

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1828.—Goleborn v. Alcock.

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of the premises, which was defended by the defendant, Thomas Alcock, as the landlord. The action was tried at the summer assizes for 1825. After the plaintiffs had made out their title to the possession of the premises, a witness for Thomas Alcock, the defendant, produced and proved two leases; one of them bearing date the 1st of September, 1790, and made between the testator, William Chilwell, of the one part, and John Clark of \*the [\*554] other part, whereby Chilwell demised to Clark part of the premises included in the lease to Hernishaw, for the term of sixty-one years, reckoning from the year 1790, at the rent of 55*l.* per annum; and the other of which leases bore date the 7th of June, 1792, and was made between Chilwell, of the one part, and John Clark and James Clark, of the other part, and, thereby, Chilwell demised to John and James Clark other hereditaments being the residue of the premises comprised in Hernishaw's lease, for the term of fifty-nine years and a half, reckoning from the year 1792, at the rent of 10*l.* per annum. As those leases bore date prior to the lease to Hernishaw, the plaintiffs were non-suited in the action. When the action was tried, these two leases were in the possession of the executor of a person named Woods, to whom they had been assigned by way of mortgage. The principal and interest secured by this mortgage were paid off in the year 1797. The leases, however, were never re-assigned to the mortgagor, but were left in the possession of the mortgagee; and they were produced, on behalf of the defendant, at the trial of the ejectment, by the solicitor to the mortgagee's executor.

After the bill was filed, the defendant, Thomas Alcock, procured the leases to be assigned to him, by the mortgagee's executor, but did not pay any valuable consideration for the assignment.

The bill after stating the before-mentioned facts, alleged, and the answer admitted, that the leases to the Clarks had been abandoned: That, ever since the lease was granted to Hernishaw, a title to the premises \*had been claimed and enjoyed under that lease: that Hernishaw, when [\*555] the lease was granted to him, entered into the possession of the premises, and neither John Clark, nor James Clark, nor any person claiming under them, at any time afterwards, claimed any title to the premises, or paid any rent for the same, nor was any rent ever demanded from them, or from any person claiming under them. The bill then deduced the title, to the premises, from Hernishaw to the defendant Thomas Alcock, and alleged that John Alcock, the uncle of T. Alcock, who, in 1803, purchased the lease from Hernishaw, and from whom T. Alcock's title to the lease was derived, had acted as Sir J. Mawbey's solicitor in preparing that lease, and at that time had, in his possession, the counterparts of the leases granted to the Clarks.

The bill further alleged that, the plaintiffs intended to bring another ejectment for the recovery of the premises, and prayed that the defendant Thomas Alcock might be decreed to deliver up, to the plaintiffs, the two leases granted to the Clarks, and might be restrained from setting up, or making use of



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those leases, as a defence to the action of ejectment intended to be commenced by them.

Mr. *Horne*, and Mr. *Koe*, for the plaintiffs :—The defendant Thomas Alcock, stands in the same situation, with respect to the lease, as *Hernishaw* did ; and must be understood to have adopted the title of the lessor. If that be so, the relation between these parties is that of landlord and tenant ; and [\*556] therefore, it necessarily follows that the defendant can not get \*out of his lease, and set up the outstanding terms granted to the *Clarks*.

No person can set up an outstanding term, to defeat an equitable title, except a purchaser for valuable consideration without notice. If the defendant is once fixed with the relation of tenant, to the plaintiffs, it is impossible for him to set up against the contract between him and his landlord, and outstanding legal estate in another person, who has no beneficial interest. That estate is outstanding not for the purpose of being used by one of the parties against the other ; but it is part of, and accompanies their common title. At the time of the trial, these terms were vested, not in the defendant, Alcock, but in the representative of the mortgagee. He would not have been permitted to set up the terms against the plaintiffs ; for, as soon as a mortgage is satisfied, the mortgagee becomes a trustee for the mortgagor. Neither the *Clarks*, nor the representative of the mortgagee have set up any claim to these terms ; then surely this defendant ought not to be permitted to avail himself of them. This defendant, and those under whom he claims, have, ever since the granting of the lease in 1798, been in possession under it, and have paid the rent thereby reserved. The taking of the lease by *Hernishaw*, was an admission that the lessor was entitled to grant the lease, and that there was no title in any other person ; and the subsequent payment of rent is a recognition of the title of the lessor, and of those who, since his death, have become successively entitled to the testator's estates. The defendant can not say that he had no notice of the lessor's title ; for the course in which the rent has been paid, is the course pointed out by the will. Therefore this is

[\*557] the case of a lessee continuing to acknowledge \*himself tenant under a lease made by a person who had no power to grant it, except under certain terms which have not been complied with. The obligations which this defendant is under to the present tenant for life, are the same as those that he would have owed to the tenant for life who granted the lease. If a tenant has any thing to contest with his landlord, he may contest it fairly, but cannot set up an outstanding term created prior to his lease. These satisfied terms are as much part of the title of the landlord, as they are part of the title of the tenant ; and, as a court of equity would not allow the landlord to avail himself of them against his tenant, so neither will it permit the tenant to set them up against the landlord. The question to be decided is, whether the lease of 1798, be a good one : and this court will not permit either of the parties to defeat the justice of the case by setting up an outstanding estate. The defendant, by abandoning the protection of his lease, and defending him-

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self under the prior terms, admits that his lease is an invalid one. The lease of 1698, was inconsistent with the prior leases, and the possession that has followed it, has been inconsistent with the title under those leases : they must, therefore, be presumed to be surrendered. The defendant admits that he paid no valuable consideration for the assignments of those leases ; from which it follows that he is not a purchaser for valuable consideration, and that the representative of the mortgagee had a mere legal estate, and who has acted fraudulently by assigning that estate to the defendant, in order to give him an unfair advantage over the plaintiffs.

The defendant claims under the solicitor who \*prepared *Hernishaw's* [\*558] lease ; and he admits that that person, had in his possession, the counterparts of the leases to the Clarks, at the time when he prepared *Hernishaw's* lease : and, therefore, he claims under a person who had notice of the existence of the leases to the Clarks before he became possessed of *Hernishaw's* lease. The defendant admits that he obtained the leases to the Clarks to be assigned to him pending the suit ; and, therefore, that assignment does not place him in a better situation than he was in before it was made.

*Mr. Sugden, Mr. Bickersteth, and Mr. Knight,* appeared for the defendant.

But the VICE-CHANCELLOR, without hearing them, delivered judgment as follows :—In this case William Chilwell, being seised in fee, devised his estates to dame *Eliz. Mawbey*, for life, with remainder to her husband, *Sir Joseph Mawbey*, for life, with remainder to his son *Joseph Mawbey, Esq.*, (who, upon the death of his father, became *Sir Joseph Mawbey*) for life, with remainder to the first and other sons of *Sir Joseph Mawbey*, the son, in tail, with remainder to the plaintiff *Catherine Goleborn*, for life, with remainder to her first and other sons in tail, with remainder to the testator's own right heirs. And the will contained a power enabling the tenants for life to grant building leases, for 61 years. The testator died in the year 1795, having made two leases, one in the year 1790, to *John Clark*, and the other, in 1792, to *John Clark and James Clark*. Those leases were, afterwards, assigned to *Wood* by way of mortgage. \*This mortgage was paid off in 1797. In May, 1798, [\*559] *Sir Joseph Mawbey*, the elder, granted the lease to *Hernishaw*, which the plaintiffs are now seeking to set aside. The first half year's rent under that lease, became due at Michaelmas, 1798. *Sir Joseph Mawbey*, the elder, died in June of that year. Now there was nothing in this lease which could lead any person to suspect that the lessor was any thing but tenant in fee of the premises. *Hernishaw* was a purchaser for a valuable consideration ; and his lease was afterwards sold to *John Alcock*, who, at the time when the lease was granted, was the solicitor of the lessor.

Now it is a settled rule of this court that, if there be a purchaser for a valuable consideration without notice, and his title is impugned, he may get in any outstanding legal estate, and set it up in defence to any ejectment that may be brought against him ; and, if the first purchaser had no notice of the ground upon which the title is sought to be impugned, a subsequent purchaser may

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protect himself, though he had notice of it. Now it does not appear that Hernishaw had any notice of the ground upon which it is now contended that his lease is void; and, if not, it is competent to Alcock to avail himself of Hernishaw's want of notice.

It has been said that it is not competent, to a lessee, to disaffirm his lessor's title.[1] That is true: but the converse, also, is true; namely, that a lessor ought not to impugn the title of his lessee. The circumstance that, since the lease was granted to Hernishaw, no rent has been paid under the leases granted to the Clarks, is of no weight. And I am of opinion that, though the

[\*560] lease to Hernishaw may be inconsistent \*with the leases to the Clarks,

I have now before me merely the case in which a person who has purchased the interest of a purchaser for a valuable consideration without notice, has got in the legal estate, and means to avail himself of it to protect his possession. And I am of opinion, that he is entitled so to do; and, therefore, I dismiss the bill with costs.[2]

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#### COOPER v. REILLY.

1829; 21st March.—*Salary.—Public policy.—Receiver.*

The salary of the assistant parliamentary counsel to the treasury is not assignable, and the court will not appoint a receiver of it.

By an indenture dated the 25th of May, 1822, and made between Sir T. E. Tomlins, of the first part, Thomas Tomlins and Richard Cuerton, of the second part, and John Reilly and James Tomlins, of the third part; after reciting that Sir T. E. Tomlins was indebted to Thomas Tomlins, Richard Cuerton, and John Reilly, in the three sums of money therein mentioned, and that Reilly, for better securing the payment of those sums, had, with the consent of Sir T. E. Tomlins, and with the privity and approbation of T. Tomlins and Cuerton, caused an insurance to be effected, on the life of Sir T. E. Tomlins, in Reilly's name, for 2,000*l.*; and, that, by and under the appointment of the commissioners of the treasury, Sir T. E. Tomlins then held the office or place of assistant parliamentary counsel to the commissioners of the treasury, with a salary or allowance of 500*l.* per annum, payable quarterly; and that, for the purpose of establishing a fund for the gradual liquidation and discharge of those debts,

and of the annual premium of the policy, Sir T. E. Tomlins had agreed [\*561] to assign all his right and interest in, and to \*the said allowance or

[1] *Vide Jackson v. Reynolds*, 1 Caine's Rep. 444. *Jackson v. Whitford*, 2 Caine's Rep. 215. *Woodward v. Brown*, 13 Peters, 4. *Jackson v. Stewart*, 6 Johns. Rep. 31. *Jackson v. De Walle*, 7 Johns. Rep. 157. *Jackson v. Vosburgh*, id. 186. *Jackson v. Hinman*, 10 Johns. Rep. 292. *Jackson v. Harper*, 5 Wend. 246: He may show that his landlord's title has terminated. *Jackson v. Davis*, 5 Cow. 123. *Jackson v. Rowland*, 6 Wend. 666.

[2] *Vide Leigh v. Leigh*, 1 Sim. 319.

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salary, unto Reilly and James Tomlins, upon the trusts after mentioned: it was witnessed that Sir T. E. Tomlins did assign, unto Reilly and James Tomlins, the said allowance or salary, to accrue due from the 5th of April, 1822, payable, to him, by the lords of the treasury, in trust to retain, apply and dispose of the same, from time to time, as and when the same should be received, in discharge of the debts before mentioned, and in keeping the policy on foot; and, after full payment of those debts, upon trust to re-assign the allowance or salary to Sir T. E. Tomlins. In August, 1824, Thomas Tomlins died, having appointed the plaintiffs his executors.

The bill was filed against Reilly, Sir T. E. Tomlins and Cuerton. It alleged that Reilly had received, under the trust deed, moneys more than sufficient to discharge the debt due to T. Tomlins; that Reilly pretended that he had never received any payments in respect of the salary, but that, ever since the execution of the assignment, Sir T. E. Tomlins had been permitted, with the consent of T. Tomlins, during his life-time, and of the plaintiffs, since his death, to receive the salary, upon condition of his paying the premium upon the policy; whereas the plaintiffs charged that neither Thomas Tomlins, in his life-time, nor the plaintiffs, since his death, had acquiesced in or assented to the receipt, by Sir T. E. Tomlins, of the salary; and that Reilly had received some of the payments thereof, and might, if he had applied or taken proper steps for that purpose, have received all the payments that had become due since the date of the assignment. The bill prayed that the trusts of the deed might be carried into execution, and that an account might [\*562] be taken of all moneys received by Reilly, in respect of the salary; and that he might be charged, personally, with such sums as he should not appear to have received, and also with such sums as he had received in respect of the salary; and that an account might be taken of what was due to the plaintiffs under the trusts of the deed, and that the plaintiffs might be paid what should be found due to them; and that, in the mean time, a receiver might be appointed of the salary.

Reilly, by his answer, said that Sir T. E. Tomlins had paid over to him two quarterly payments of the salary, but denied that he had received any payment thereof from the lords of the treasury: he further said that no assignment of the salary, either for the purpose of paying creditors, or for any other purpose, was ever allowed or recognized by the officers of the treasury; and that, for that reason, and also because he was advised that the assignment was, both at law and in equity, invalid, he could not, if he had applied or taken proper or any steps for that purpose, have received any of the payments of the salary, and he submitted to the court whether the salary was such an interest as was capable of assignment in equity; and whether the assignment was not wholly void, as well in equity as at law. Sir T. E. Tomlins, in his answer, stated that the officers of the treasury would not, as he had been informed and believed, allow of or recognize the assignment of his salary; and he submitted, that such assignment was altogether void both at law and in equity.

1829.—*Dawkins v. Tatham.*

[\*563] \*A motion was now made, on behalf of the plaintiffs, for a receiver, according to the prayer of the bill.

Mr. Sugden and Mr. Pemberton, for the plaintiffs, in support of the motion:—It is not disputed that certain payments of his salary have been made, to Reilly, under the deed. The only ground of opposition is, that this salary is an interest which is not assignable. The defendant Reilly is not entitled to make that objection, as he is only a trustee. This is a salary for mere work and labor done, and not for work done in a confidential character. It does not resemble half pay, which is in the nature of a retainer for the future services of the party.[1]

Mr. Bickersteth, and Mr. G. L. Russell, for the defendants Reilly and Sir T. E. Tomlins:—The question is, whether the court will appoint a receiver of a salary of this nature. It is an income granted by the crown, *pro consilio impendendo*. It is for the interest of the crown that persons, to whom it grants salaries for services to be performed, should continue to receive those salaries. The appointment of a receiver would be nugatory, as no person but Sir T. E. Tomlins can receive the salary. It is not different, in principle, from half pay. The court never appoints a receiver unless he can legally recover. The assignment is void on grounds of public policy. *Davis v. Duke of Marlborough*.(a)

Mr. Sugden, in reply:—In *Davis v. The Duke of Marlborough*, [\*564] the estates were inalienable, and yet Lord Eldon appointed a \*receiver of the life estates; because it was not expressly declared that they should not be subject to charges of such a nature as those which the duke had created. The cases as to half pay do not apply. If the services are withheld, the salary ceases.

The VICE-CHANCELLOR:—It appears to me that this case does come within the principle of the cases that have been alluded to. The decision in *Davis v. The Duke of Marlborough* turned upon the particular words of the

(a) 1 Swanst. 74, and 2 Swanst. 108.

[1] "There are various cases in which public duties are concerned, in which it may be against policy, that the income arising from the performance of these duties should be assigned; and for this simple reason, because the public is interested, not only in the performance from time to time of the duties, but also in the fit state of preparation of the party having to perform them. Such is the reason in the cases of half pay where there is a sort of retainer, and where the payments which are made to officers, from time to time, are the means by which they, being liable to be called into public service, are enabled to keep themselves in a state of preparation for performing their duties. If therefore they were permitted to deprive themselves of their half pay they might be rendered unable promptly to enter upon their duties, when called upon, and the public service would be thereby greatly injured." "And so in the course of that case, (*Davis v. Duke of Marlborough*, cited above,) Lord Eldon said, in the way of illustration, and in allusion to the pension of a great public officer, that it could not be aliened, because that public officer must not be allowed to fall into such a situation as to make it difficult for him, in consequence of any pecuniary embarrassment, to maintain the dignity of his office." Lord Langdale, M. R. *Grenfell v. Dean and Canons of Windsor*, 3 Beav. 544, in which case the office of which the salary was assigned, if ever it were an office, was not of a public nature.

1829.—*Padmore v. Skipwith.*

second act of parliament mentioned in that case. I think that this salary is not assignable on grounds of public policy.

Motion refused. (a)

\**PODMORE v. SKIPWITH.*

[\*565]

1829; 26th March; 6th and 15th May.—*Tithes.—Supplemental Answer.*

Defendant, in her answer to a bill for tithes, pleaded a modus for all tithes. She then discovered that the modus covered part only of the tithes, and moved to correct the mistake by filing a supplemental answer: ordered that the cause should proceed as if the modus had been laid in the manner proposed.

THIS was a suit for tithes, instituted by a rector against the occupiers of lands in his parish. Lady Skipwith, one of the defendants, had, in her answer, stated that a certain modus was payable for all tithes within the hamlet of Newbold, which was part of the parish. An application was now made to the court, on her behalf, for leave to file a supplemental answer, for the purpose of confining the modus to the tithes of the pasture land within the hamlet.

By an affidavit in support of the motion, she deposed that, when she put in her answer, she was advised that the modus covered the whole of the rectorial tithes in the hamlet; but that she had since been advised that it covered the tithes of the pasture land only.

The answer had been replied to; but no witnesses had been examined.

Mr. Knight, in support of the motion, said that the alteration proposed to be made in the defence was for the benefit of the plaintiff, as the defendant sought to narrow her defence; that the defendant did not seek to vary a fact, but merely to change an inference in point of law.

Mr. Spence for the plaintiff, said that the defendant did not swear, in her affidavit, that any new fact had \*come to her knowledge since [\*566] putting in her answer: that the only cases in which the court had allowed a defendant to file a supplemental answer, were where he had become acquainted with facts which were not known to him when he put in his answer, or where he had stated one fact meaning to state another. *Wells v. Wood.*(b)

The Vice-Chancellor, said that he had some recollection of a case where a modus has been stated, and the parties, having afterwards found that they had made some mistake, applied to Lord Eldon for leave to file a supplemental answer, for the purpose of correcting the mistake; and his lordship ordered

(a) The Vice-Chancellor's decision in the above case, was afterwards affirmed by the Lord Chancellor; but, on the cause being heard before the master of the rolls, on the 4th of May, 1830, his honor directed a case to be made for the opinion of the judges of the court of common pleas, as to whether the salary was or was not assignable. [For the history of this case subsequent to the report in the text, see 1 Russ. & M 560.]

(b) 10 Ves. 401.

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 1829.—Carrington v. Cornock.
 

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that the cause should proceed as if the modus had been laid in the way in which it was proposed.(z)

On this day the Vice-Chancellor ordered that the cause should proceed, and the issue between the parties be considered as if the modus had been laid in the manner mentioned in the notice of motion.[1]

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[\*567]

\*CARRINGTON v. CORNOCK.

1829; 27th March, and 25th July.—*Practice.—Depositions.*

Although there are two suits in this court between parties having the same respective interests, and relating to the same matters the depositions of such only of the witnesses in the prior suit, as are dead, will be allowed to be read in the subsequent suit.

THE plaintiff was the vicar of the parish of Berkley, in Gloucestershire. The bill was filed against some of the occupiers of lands within the parish, for an account and payment of certain small tithes. The plaintiff had, some time before, filed a bill, in this court, against one Jones, and other occupiers in the parish, for a similar purpose, except that the last mentioned bill included the tithes of milk and foals, which were omitted in the present one. The defence set up in both suits was the same, namely, moduses or customary payments. The answer of the defendants having been replied to, and the cause being at issue, the defendants moved that the depositions of witnesses taken, by the defendants, in the cause of *Carrington v. Jones* and others, both previous and subsequent to the decree, might be read at the hearing of this cause against the plaintiff, saving all just exceptions.

In opposition to this motion the plaintiff filed an affidavit, in which he deposed that Cornock and Cox, two of the defendants in this cause, were examined as witnesses, in the cause of *Carrington v. Jones* and others, for the defendants in that cause: that the witnesses who were examined in the last mentioned cause, were, with a few exceptions, still alive, and capable of being called as witnesses in the present cause: that he omitted to join in the commission taken out, by the defendants in that cause, for the examination

[\*568] \*of witnesses on their behalves, whereby he was debarred from cross examining the witnesses produced and examined under that commission.

Mr. *Bickersteth*, in support of the motion cited the *Mayor of London v. Perkins*,(a) *Williams v. Broadhead*; (b) and said that the reason why the application was refused in *Goodenough v. Alway*,(c) was, that the depositions had been taken in another court.

Mr. *Sugden*, for the plaintiff:—If the witnesses are living, is not the plaintiff

(z) The name of the case alluded to was not mentioned.

(a) 3 Bro. P. C. 602,

(b) 1 Sim. 151.

(c) 2 Sim. & Stu. 481.

[1] As to supplemental answer, see *Jackson v. Parish*. 1 Sim. 505, 509, note.

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 1829.—*Carrington v. Corsock.*


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to have an opportunity to cross examine them in this suit? In *Goodenough v. Alway* the decision did not turn on the other suit being in the exchequer, but because it was not between the same parties. The tithes demanded in these two suits are not the same; for the tithes of milk and foals are sought to be recovered in one suit, and not in the other. *Eade v. Lingood*,<sup>(d)</sup> *Mackworth v. Penrose*.<sup>(e)</sup>

Mr. *Bickersteth*, in reply:—The bill in this cause is filed for tithes of the same parish, and against persons standing in the same situation as the defendants in the former suit, and though the defence set up in this suit might have been different from the defence made in the other, yet that is not the case; for the answer has been put in and replied to in this cause, and it appears that there is no difference between the defences made in the two suits.

[\*The Vice-Chancellor:—It appears that the witnesses, whose de- [\*569] positions were sought to be read in the *Mayor of London v. Perkins*, were all dead.]

As the order is applied for, saving all just exceptions, if it appears that any of the witnesses, whose depositions are proposed to be read, are living, their testimony may be objected to. The only objection made by the plaintiff, is that he did not cross examine the witnesses; but it was his own neglect, and the defendants are not to be prejudiced by it.

The VICE-CHANCELLOR:—If it appears that any of the witnesses in the cause of *Carrington v. Jones* are dead, the court will order that their depositions may be read in this cause, saving just exceptions. But, before the court can make that order, it ought to appear, by affidavit, which of the witnesses are dead.

25th July.—An affidavit was afterwards made, by the solicitor for the defendants, stating that five of the witnesses in *Carrington v. Jones*, whose names were mentioned, were dead; upon which the court ordered that the defendants should be at liberty to read, at the hearing of the cause, the depositions of those five witnesses saving just exceptions.

(d) 1 Atk. 203, 204.

(e) 1 Dick. 50.



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1829.—Memoranda.

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[\*570]

## \*MEMORANDA.

Mr. Knight in arguing a case of *Cliffe v. Wilkinson*, in Hil. Term 1831, stated that Sir Anthony Hart, on a day subsequent to that on which he had made the order in *Camac v. Grant*, ante vol. i. 348, had directed that the order should not be drawn up, as he did not consider himself to be warranted, by the practice of the court, in making it.

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The decision in *Prebble v. Boghurst*, reported ante, p. 246, was affirmed by Lord Lyndhurst, C. on the 22d day of Nov. 1830.

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The question that arose in *Williams v. Thorp*, reported ante, p. 257, again came before the court, upon the hearing of a bankrupt petition, ex parte Colville, in the matter of Severn, at the sittings after Michaelmas term, 1830. On the 10th of January, 1831, the Vice-Chancellor delivered judgment, in which he adhered to his decision in *Williams v. Thorp*, and concluded by saying that, upon the whole he was bound to declare the law to be that, where a person who has effected an insurance on his life, assigns the policy and delivers it to the assignee, but does not give notice of the assignment to the insurers, if he afterwards becomes bankrupt, the assignment is void as against the assignees under the commission.

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To the case referred to ante, p. 454, note (a), add *Thring v. Edger*, 2 Sim. & Stu. 274, *Somers v. King*, ibid 277, and *Pennington v. Beechey*, ibid. 282.

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The case of *Jones v. Yates*, referred to ante, p. 470, note, (k) is reported in 2 Young & Jer. 373.

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Testator declared trusts of stock for A. for life, and after his decease for his children and declared that the provision he had made for A. should not be subject to any alienation or disposition by him, but if he should alienate, or attempt to alienate, it should operate as a for-

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## APPOINTMENT.

- By Mr. and Mrs. P.'s marriage settlement, estates in Kent and other counties, the lady's property, were settled on her for life, remainder to Mr. P. for life, if she should so appoint, remainder to their children, remainder as Mrs. P., by deed under her hand and seal, attested, &c., or by her will, signed and published in the presence of three witnesses, should appoint; remainder to Mrs. P. in fee, with a power of sale, and directions for re-investing the proceeds in other estates, and in the usual securities, in the interim, and upon the re-investment, the uses of the settlement were to cease as to the sold estates. Mrs. P., by deed executed in the presence of three witnesses, but not attested, (at the foot of which she had written, without date, directions for her burial,) appointed the estates, after her decease, to her husband for life, and in default of children, to him in fee; and she revoked a prior deed of appointment. The estates were afterwards sold, and the proceeds invested in securities, but were never re-invested in lands, although their liability to be so was recognized by the parties. There was no issue of the marriage. Mrs. P. survived her husband and applied part of the proceeds to her own use. At her death, she was seized (exclusive of the settled property) of a mansion-house, with outbuildings, gardens, and a small field adjoining it, and some cottages opposite to it, let to tenants, and was possessed of some personal estate, no part of which was in the name of a trustee. She devised the mansion house, with its appurtenances, and all other her messuages, lands, &c. to C. S., and bequeathed all her personal estate, whether in the name of herself or of any trustee, subject expressly to her debts and legacies to other persons. After her death, the deed of appointment was found, in her house, with the title-deeds of the mansion-house; but the revoked deed could not be found. Her debts and legacies greatly exceeded her assets. Held, that the former deed was not a testamentary instrument, and that Mrs. Pyott's receiving part of the proceeds of the settled estates, was not an entry or claim within the 54 G. 3, c. 118, but that that statute remedied the defect of attestation: that the remaining proceeds remained as real estate, but did not pass either to the devisee or the residuary legatees in the will: that Mr. P.'s co-heirs in gavelkind were not entitled to any part but that the whole belonged to his heir at law, under the appointment. *Hougham v. Sandys*, 95
2. Testator gave 3,000*l.* to trustees for life; remainder to such persons as she should appoint. C. S., by her will, disposed of all her personal estate, and then gave all sums, messuages, &c. and other interest to which she was entitled under the testator's will: held, that the latter gift was a good execution of the power. *Maples v. Brown*, 327
3. A. having a power to appoint 10,000*l.* amongst his younger children, appoints it to them equally, reserving to himself a power of revocation as to 5,000*l.*, which he afterwards irrevocably appoints to E., one of the children, in consideration of her having agreed to apply part of it in payment of his debts. Afterwards

A., by a deed, to which E. is also a party, revokes, with her consent, the last appointment, as to 2,500*l.*, and, in pursuance of all powers, appoints that sum to a child by a second marriage, and confirms E.'s title to the remainder under the former appointment: held, that the appointment of the 5,000*l.* being void, the appointment of 2,500*l.* must also fail. *Farmer v. Martin*, 502  
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## APPROPRIATION.

A receiver of an estate in Jamaica, appointed by the court of chancery there, in a suit, by a second incumbrancer, to have the proceeds of the estate applied in satisfaction of the incumbrances, was ordered, out of the first proceeds, to pay to A. the first incumbrancer, in London, the interest on her charge, and to consign the produce to B. the plaintiff, a merchant in England, for sale. The receiver, on making the first consignment, sent the bill of lading to A., with directions to deliver it to B., on payment of her interest. The consignments were afterwards made, by B.'s direction, to other merchants, who, for several years, continued to pay A. her interest: but afterwards ceased to do so. Upon which she filed a bill in this country, against them, the receiver and the owners of the estate for an account of the consignments and payment of her interest, charging collusion between the consignees and the receiver.

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## ASSIGNABLE INTEREST.

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## ASSIGNEES.

See *BANKRUPT*.

## ASSURANCE.

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1. Where a defendant, after notice of the plaintiff's intention to issue an attachment unless an order for time is obtained, procures the order, but is unable, on account of the press of business, to get it drawn up, and omits to give the defendant notice of the order until an attachment is sealed, he cannot set aside an attachment. *Kirkpatrick v. Meers*, 16
  2. An attachment for non-appearance to a subpoena, served in Guernsey, is irregular. *Fernandez v. Corbia*, 544
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## BANKRUPT.

1. The assignment of a policy of assurance on a life does not take it out of the order and disposition of the assignor, if no notice of the assignment is given to the insurers. *Williams v. Thorp*, 257. See p. 570
2. Husband and wife made a post nuptial settlement in 1821, of moneys due to the wife. The monies were received by the trustees, and invested in their names. The husband was a

trader and had committed acts of bankruptcy prior to the settlement. In 1823 he was declared bankrupt; held, that his assignees were entitled to the fund. The 6 Geo. 4, c. 16. s. 73, has no retrospective operation. *Wombwell v. Laver*, 360

3. Testator declared trusts of stock for A. for life, and, at his decease, for his children and declared that the provision he had made for A. should not be subject to any alienation or disposition by him; but if he should alienate, or attempt to alienate, it should operate as a forfeiture of the provision, and the same should devolve on the person next entitled. A. who had several children became bankrupt; held, that his assignees were entitled to his life interest. *Lear v. Leggett*, 479

4. The defendant, in his answer to a bill filed by the assignees of a bankrupt, alleged that the plaintiffs had not obtained the necessary consent to the institution of the suit; upon which the plaintiffs filed a supplemental bill, stating that since the filing of the original bill, they had obtained the necessary consent. Demurrer to the supplemental bill allowed. *King v. Tullack*, 469

See p.

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#### BILL OF EXCHANGE. (Lost.)

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#### BILL TO PERPETUATE TESTIMONY.

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#### CHARITY.

1. Where charity estates are directed by the founder to be leased for twenty-one years the court has no authority to order them to be leased for ninety-nine years. *The Attorney-General v. The Mayor of Rochester* 34
2. A bequest of a sum of money to pay off a debt secured, by an equitable charge only, upon a meeting house is void. *Waterhouse v. Holmes*, 169
3. A grant from the crown to a city of certain privileges and property, for the defence and preservation of peace within the city, is a charitable gift: *Semle*. *The Attorney General v. The Mayor and Corporation of Carlisle*, 437

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#### CHOSE IN ACTION.

1. The court has no jurisdiction to order, upon motion, a person not a party in the cause, to pay into court the arrears of an annuity granted by him to a defendant against whom a sequestration has issued for want of a sufficient answer, unless the grantor has, by his conduct, waived the objection to the jurisdiction. But

he may, notwithstanding, and without applying for the leave of the court, obtain from the grantee a release of the annuity. *Johnson v. Chippindall*, 55

2. A man whose wife was entitled to a personality, subject to a life-interest in A. becomes bankrupt, and afterwards obtains his certificate; then A. dies, and afterwards the wife, and the husband takes out administration to her; held, that his assignees are nevertheless entitled to the property. *Ripley v. Woods*, 165

3. The husband of a woman, having a vested interest in possession in a legacy, becomes bankrupt; his assignee files a bill against the testator's executors, to compel payment of the legacy, and soon afterwards the husband dies; held that the widow, and not the assignee, is entitled to the legacy. *Pierce v. Thornley*, 167

See BANKRUPT, 1.

#### COLONY.

See REVOLVED COLONY.

#### COMPENSATION.

An estate consisting of fen land, and so described in the particulars of sale, was charged by a local but public act of parliament, with drainage and embanking taxes, of which the purchaser had no express notice: held, that he was not entitled to a compensation for those taxes. *Barraud v. Archer*, 433

See SPECIFIC PERFORMANCE.

#### CONSIGNEES.

A receiver of an estate in Jamaica, appointed by the court of chancery there, in a suit by a second incumbrancer, to have the proceeds of the estates applied in satisfaction of the incumbrances, was ordered, out of the first proceeds to pay to A. the first incumbrancer, in London, the interest on her charge, and to consign the produce to B. a merchant in England, for sale. The receiver, on making the first consignment, sent the bill of lading to A. with directions to deliver it to B., on payment of her interest. The consignments were afterwards made, by B.'s direction, to other merchants, who for several years, continued to pay A. her interest; but afterwards ceased to do so. Upon which she filed a bill in this country, against them, the receiver and the owners of the estate, for an account of the consignments and payment of her interest, charging collusion between the consignees and the receiver. Demurrer by the consignees, for want of equity, overruled. *Fitzgerald v. Stewart*, 333

#### CONSOLIDATION OF SUITS.

Motion by defendants in tithe suits, in all of which the same defence was made, that the suits might be consolidated, refused. *The Warden and Fellows of Manchester College v. Isherwood*, 476

#### CONSTRUCTION.

1. A native of Scotland, domiciled in England,

- having personal property only, executed, during a visit to Scotland, and deposited there a will prepared in the Scotch form, and died in England: held, that the will was to be construed according to the English law. *Anasthther v. Chalmer*, 1
2. Testator directed his executors to purchase, out of his residuary estate, a certain sum of stock, and to pay the dividends to his wife for her life, and after her death to divide the capital between such of his three daughters as should be then living; provided that if any one of them should be then dead, or should afterwards die before her share should become payable or divisible, leaving a child or children, that share should go to such child or children. The testator's wife died in his life-time. One of the daughters died three months after the testator: held, nevertheless, that she had a vested interest in one of the shares. *Collins v. Macpherson*, 87
3. Bequest of 40l. per annum to A. for life, and after her decease, to B. or his heirs: held, that "or" must be construed disjunctively; and that therefore, B. did not take an absolute interest in the annuity. *Girdlestone v. Doe*, 225
4. Devise to A. for life, and to her heirs the issue of her body, forever, for their lives; and in case A. has no son, then to her eldest daughter; followed by a proviso, containing a devise over, if A. left no issue, or they should become extinct, creates an estate tail in A. *Reece v. Steel*, 233
5. Devise to A. and her heirs, but if she died, leaving issue then to such issue and their heirs. A. died, leaving issue: held, that her husband was not entitled to be tenant by the courtesy. *Barker v. Barker*, 249
6. Testator gave to his heir one shilling, and devised to W. B. all his lands; and in the next sentence, gave to him all his goods, chattels, personal and testamentary estate: held that the fee-simple of the lands passed to W. B. *Bradford v. Belfield*, 264
7. Devise to A. B. C., &c., share and share alike, for their lives, remainder to their respective children, for their lives, and so to be continued, from issue to issue, for life. But, if any of them die, leaving no issue, their shares to go to the survivors, for their lives, and the issue of such of them as shall be dead, and for default of any issue, then over: held, that A. B. C. &c. take estates tail, with cross-remainders. *Mortimer v. West*, 274
8. A testator in designating the object of a power of appointment given to his daughter, used the words "issue," and "child or children," synonymously. In a subsequent part of his will, he gave his son a power of appointment over a different part of his property, and in pointing out the objects of it, used the word "issue" simply; the son had both children and grandchildren living at his death: held, that an exercise of the power in favor of the former only was void. *Dalsel v. Welch*, 319
9. Testator gave to his widow a life-interest in a fund, with a power of appointment amongst all his children living at her death; and in default of appointment, directed the fund to be divided amongst all such children, with a gift over to the widow, in case all the children died before their shares became payable. The widow appointed the fund to the two surviving children; one of them died in her life time: held that the only surviving child took, upon the widow's death the whole of the fund. *Bielefeld v. Record*, 354
10. Testator declared trusts of stock for A. for life, and after his decease, for his children, and declared that the provision he had made for A. should not be subject to any alienation or disposition by him, but if he should alienate or attempt to alienate, it should operate as a forfeiture of the provisions, and the same should devolve on the person next entitled. A., who had several children, became bankrupt: held, that his assignees were entitled to his life interest. *Leas v. Leggett*, 479
11. Testator gave to his daughter and her children 5,000l.; 3,000l. to be paid in one year after his decease, and 2,000l. after the decease of his wife, and appointed A. B. trustees of those sums for his daughter and her children. The court declared the 5,000l. to be in trust for the daughter for life, and after her decease for all her children, whether born in the testator's life time, or after his decease. *Morse v. Morse*, 485
12. Bequest to H. D. for his own use, and in case he should die in the testator's life time or afterwards, without having any child or children, then over. H. D. survived the testator, and died without having had a child: held, that the gift over took effect. *Stone v. Maule*, 490
13. J. B. at his death had a balance due from his banker and was also entitled to a share of the balance due to A. B. from his banker, A. B. having received monies for him from time to time, and with his knowledge, paid them to his own banker. But J. B. had no concern with A. B.'s bankers, nor did they know he was interested in the monies paid by A. B. J. B. bequeaths all his money in the hands of any banker: held, that his balance at his own bankers, and also his share of A. B.'s balance will pass; and that evidence is admissible to show that he so intended. *Heming v. Whitman*, 493
14. A testator who had long resided in India, gave a legacy to T. P., "who resided at A. when I left England, or to his heirs, executors, administrators or assigns." T. P. died in the testator's life-time: held, that the bequest over was void for uncertainty. *Weite v. Templer*, 524
- See LEGACY, 1, 2. LEGACY DUTY.
- ### CONSTRUCTION OF ORDER.
- A motion for a new trial must be made before the same jurisdiction as directed the former trial, although the judge may have been removed. *Footner v. Figea*, 319
- See PRACTICE, 14.
- ### CONTEMPT.
- See PRACTICE, 11.
- ### CONVERSION.
- Testator gave a copyhold estate to trustees for his

wife, until the leases to which it was subject expired, and directed that then it should be sold and the proceeds be invested for the benefit of his children; but if his wife should die before the leases expired, that it should be immediately sold, and the proceeds disposed of as before. The wife survived the children, but died before the leases expired. The surviving trustee, who claimed the estate for his own benefit, was decreed to surrender it to the administrator of the children, but without prejudice to the rights of the customary heirs of either the testator or the children, if any such heirs were in existence. *Burton v. Hodsoll*, 24

**COPYHOLD.**

A copyhold estate will not pass by the will of a deviser, who dies before admittance. *King v. Turner*, 545  
**See CONVERSION. INFANT TRUSTEE. PRIORITY OF INCUMBRANCES.**

**COPYRIGHT.**

The court will not protect a foreigner's copyright. *Delandre v. Shaw*, 237

**COSTS.**

1. The master was ordered to tax the costs of all parties, and the amount was directed to be paid, out of the assets of the testator in the cause, by his executors, who were to be at liberty to pay the costs of certain parties to A. B., their solicitor. A. B. was an attorney of K. B. and C. P., but had never been admitted as a solicitor in the court of chancery; and the master, for that reason, disallowed the whole of his charges, except what he had paid to his clerk in court. He had, however, previously received from his clients, to the full amount of his bills. The clients then petitioned for an order on the master to review his certificate, and tax A. B.'s bills; but their petition was dismissed. *Prebble v. Boghurst*, 246. See p. 570
2. Injunction granted to restrain an action for the amount of a solicitor's bill, which had been taxed after the commencement of the action, and more than one sixth had been taken off, but the costs of taxation had not been ascertained. *Walton v. Johnson*, 456
3. One of the terms of an agreement was, that the contract should be void if the purchaser's counsel should be of opinion that a marketable title could not be made by a certain time. The counsel being of that opinion, a bill by the purchaser, for a specific performance with a compensation, was dismissed with costs. And an application afterwards made by the plaintiff, that his deposit might be set off against the defendant's costs, and the surplus (if any) paid to him, was refused with costs. *Williams v. Edwards*, 78
4. A first incumbrancer having a power of sale, but having lost the title deeds, institutes a suit to have the estate sold; the subsequent incumbrancers are entitled to be paid their costs, although the proceeds of the sale are not sufficient to pay what is due to the plaintiff. *Wentner v. Wright*, 543

**See BILL TO PERPETUATE TESTIMONY, 1. PRACTICE, 20.**

**CROSS-EXAMINATION.**

A party who omits to cross-examine a witness under a commission at the usual period, will be allowed to exhibit interrogatories for that purpose on a subsequent day. *Carter v. Draper*, 52

**CROSS-REMAINDERS.**

**See WILL, 8.**

**DAMAGES.**

**See INJUNCTION, 4. TENANT FOR LIFE, and REMAINDER MAN.**

**DEBTS.**

**See TENANT FOR LIFE.**

**DEBTOR AND CREDITOR.**

**See PRINCIPAL AND SURETY. SPECIALTY DEBT.**

**DEFENDANT.**

If a defendant pleads that giving the discovery sought by the bill, will subject him to penalties, but, between the filing and the hearing of the plea, the time for suing for the penalties expires, the plea will be overruled. *The Corporation of Trinity House v. Burge*, 411  
**See ATTACHMENT. PLEADING, 2, 3, 4. PRACTICE, 13. SUPPLEMENTAL ANSWER.**

**DEMURRER.**

Leave given to file a general demurrer after the second order for time had been taken out, the subpoena having been made returnable immediately, and there having been no wilful delay on the part of the defendants. *The Attorney General v. The Mayor and Corporation of Carlisle*, 427  
**See CONSIGNEES. EQUITY, 1. 3. JOINT STOCK COMPANY. JURISDICTION, 4. MULTIFARIOUSNESS. PLEADING, 3, 4. PUBLIC POLICY, 3, 4. SUPPLEMENTAL BILL.**

**DEPOSITIONS.**

Although there are two suits in this court between parties having the same respective interests, and relating to the same matters, the depositions of such only of the witnesses in the prior suit as are dead will be allowed to be read in the subsequent suit. *Carrington v. Cornock*, 567

**DISCLAIMER.**

To a bill praying a re-conveyance of four estates, the defendant put in a plea of a fine as to one, concluding with a disclaimer as to the others: the plea was overruled. *Watkins v. Stone*, 49

**DISCOVERY, BILL OF.**

**See PLEADING, 1, 3. STATUTE OF LIMITATIONS.**

## DISMISSAL OF BILL.

1. Amendment of a bill without serving a subpoena to answer the amendments, will not prevent the defendant from dismissing the bill. *Braaston v. Carter*, 458
  2. On the 28th November, plaintiffs filed a replication, and on the 29th, a subpoena to rejoin, returnable immediately, tested on the 27th, but without obtaining an order for a subpoena so returnable; afterwards the defendant obtained an order to dismiss: held that the subpoena was irregular, and a motion to discharge the order of dismissal was refused. *Brown v. Moore*, 464
  3. If, between the giving of a notice of motion to dismiss, and the making of the motion, plaintiff obtains an order to amend, the plaintiff must pay the costs of the motion; but no order will be made upon it. *Davenport v. Manners*, 514
- See BILL TO PERPETUATE TESTIMONY, 1. VENDOR AND PURCHASER, 6.

## DISSENTERS.

See JURISDICTION, 5.

## DOMICIL.

A native of Scotland domiciled in England, having personal property only, executed, during a visit to Scotland, and deposited there a will, prepared in the Scotch form, and died in England: held, that the will was to be construed according to the English law. *Anstruther v. Chalmers*, 1

## EQUITY.

- A., the inventor of a medicine, employed B., a foreigner residing abroad, to manufacture it for him there, and sold it in England for his own sole profit. A label and seal, denoting that the medicine was manufactured by B and sold by A., were affixed to the bottles in which it was sold. The defendants imitated the labels and seals. Demurrer allowed to a bill to restrain the imitation, and for an account of the sales of the spurious label and seals, A. having no interest. *Delondre v. Shaw*, 237
2. A bill will lie by the last indorsee of a lost bill of exchange to recover the amount from the acceptor; and prior indorsees need not be made parties to the suit. *Macartney v. Graham*, 285
3. A receiver of an estate in Jamaica, appointed by the court of chancery there, in a suit by a second incumbrancer, to have the proceeds of the estates applied in satisfaction of the incumbrances, was ordered, out of the proceeds to pay to A. the first incumbrancer, in London, the interest on her charge, and to consign the produce, to B., a merchant in England, for sale. The receiver, on making the first consignment, sent the bill of lading to A., with directions to deliver it to B. on payment of her interest. The consignments were afterwards made, by B's direction, to other merchants, who for several years, continued to pay A. her interest; but afterwards ceased to do so. Upon which she filed a bill in this country against them the receiver and the owners of the estate, for

an account of the consignments and payment of her interest, charging collusion between the consignees and the receiver.

- Demurrer, by the consignees, for want of equity, overruled. *Fitzgerald v. Stewart*, 333
4. A receiver appointed in a suit instituted by incumbrancers was ordered to keep down the incumbrances out of the rents, and to pay the residue to the owner of the estate. A judgment creditor of the owner of the estate, subject to the incumbrances, may file a bill against the owner and receiver, without making the other incumbrancers parties, to have his debt satisfied out of the surplus rents. *Lewis v. Lord Zouche*, 388
- See AGREEMENT, 1. 2. JOINT STOCK COMPANY, 1. JURISDICTION, 4. LANDLORD AND TENANT.

## EQUITY OF REDEMPTION.

See PARTIES, 5.

## ESCHEAT.

See CONVERSION, 1.

## EVIDENCE.

A terrier is evidence as to personal tithes. *Townley v. Colegate*, 297

See DEPOSITIONS, WILL, 12.

## EXAMINATION OF WITNESSES.

See WITNESSES.

## EXECUTOR.

An executor filed a bill before probate; plea, that he had not proved the will, allowed. *Simons v. Milman*, 241

See CHOSE IN ACTION, 3. INJUNCTION, 4.

## FINE.

See PLEA AND PLEADING, 2.

## FORECLOSURE.

See PLEA AND PLEADING, 10, 11.

## FOREIGN LOAN.

See USURY. PUBLIC POLICY, 4.

## FOREIGNER.

See COPYRIGHT.

## FORFEITURE.

See ALIENATION.

## FRAUD.

The holders of shares in a joint stock company, purchased immediately from the company, are entitled to relief, in equity, against the fraudulent conduct of the directors. *Blain v. Agor*, 289

## GUARDIAN.

Where three joint guardians are appointed, and one dies, the survivors will be appointed guardians without a reference. *Hull v. Jones*, 41

**GUATEMALA LOAN.**

*See* USURY.

**HUSBAND AND WIFE.**

1. The husband of a woman, having a vested interest in possession in a legacy, becomes bankrupt; his assignee files a bill against the testator's executors, to compel payment of the legacy; and soon afterwards the husband dies: held, that the widow, and not the assignee, is entitled to the legacy. *Pierce v. Thornely*, 167

2. A man, whose wife was entitled to personality subject to a life interest in A., becomes bankrupt, and afterwards obtains his certificate; then A. dies, and afterwards the wife, and the husband takes out administration to her: held that his assignees are nevertheless entitled to the property. *Ripley v. Woods*, 165

*See* BANKRUPT, 2. *TENANT BY THE COURTNEY.*

**INCUMBRANCER.**

*See* APPROPRIATION. *CONSIGNEE.* COSTS, 4. *JUDGMENT CREDITOR.* *PRIORITY OF INCUMBRANCES.*

**INDORSEE.**

*See* PARTIES, 1.

**INFANT.**

*See* GUARDIAN. *PARENT AND CHILD.* *PRACTICE*, 11.

**INFANT TRUSTEE.**

A copyholder covenants to surrender to trustees, in trust to sell, and dies before surrender, leaving an infant heir, the covenantees agree to sell the estate, and afterwards file a bill for a specific performance: held, that the heir is not an infant trustee within 6 Geo. 4, c. 74, and therefore cannot be ordered to surrender immediately, and consequently that the bill must be dismissed, with costs. *King v. Turner*, 549

**INJUNCTION.**

1. Motion by a plaintiff to restrain an action brought by one defendant against a co defendant, granted. *Kingham v. Maisey*, 41
2. Injunction granted to restrain an action for the amount of a solicitor's bill which had been taxed after the commencement of the action, and more than one sixth had been taken off, but the costs of taxation had not been ascertained. *Walton v. Johnson*, 456
3. Motion refused to dissolve an injunction granted, on affidavit and certificate, to restrain execution on a judgment obtained by the defendant against the plaintiff, the latter having obtained a judgment to a greater amount against the former. *Williams v. Davies*, 461
4. If a cause for the administration of assets has been heard for further directions, and the executors have paid their balances into court, an injunction will be granted to restrain an action against the executors, for breaches of covenant in a lease granted to the testator, and the master will be directed to ascertain the damages. *Sutton v. Mashiter*, 513

5. The common injunction is not dissolved by the plaintiff obtaining an order to amend without saving the injunction, unless the record is altered. *Davis v. Davis*, 515

6. Courts of equity have a concurrent jurisdiction with the courts of law in relieving against promissory notes taken when over due. *Hedgson v. Murray*, 515

*See* COPYRIGHT. *EQUITY*, 1. *JURISDICTION*, 5. *LANDLORD AND TENANT.* *PRINCIPAL AND SURETY*, 3. *PRACTICE*, 7, 8.

**INTEREST.**

1. Purchaser of a reversion ordered to pay interest on his purchase money from the time of his purchase. *Trefusis v. Lord Clinton*, 359
- See* ACCOUNT. *TENANT FOR LIFE OF RESIDUE.*

**INTERROGATORIES.**

*See* CROSS EXAMINATION.

**ISSUE.**

Issue directed on the application of a vicar to try the right to tithes. *Townley v. Colegate*, 297

**JOINT STOCK COMPANY.**

1. The holders of shares, in a joint stock company, purchased immediately from the company, are entitled to relief, in equity, against the fraudulent conduct of the directors. Some of the shareholders in a joint stock company may file a bill to have their deposits repaid without making all the other shareholders parties, if they are ignorant of their names. *Blain v. Agar*, 289
2. Some of the members of a partnership cannot file a bill, on behalf of themselves and the others, for a dissolution of the partnership; but all the members, however numerous, must be parties to the suit. *Long v. Yonge*, 369
3. An act of parliament for forming a joint stock company, authorized all suits, on behalf of the company, against any person, to be commenced in the name of the chairman, and in all proceedings in which it would have been before necessary to state the name of the chairman only. Held, that the acts did not authorize suits to be commenced by the chairman against one of the partners, without making the others parties. *MacMahon v. Upton*, 473

**JUDGMENTS.**

1. Motion refused to dissolve an injunction, granted an affidavit and certificate, to restrain execution on a judgment obtained by the defendant against the plaintiff, the latter having obtained a judgment to a greater amount against the former. *Williams v. Davies*, 461
2. Old judgments existing against a former owner of leaseholds, who parted with the property in 1770, and to enforce which no steps appeared to have been taken, are no objection to the title. *Causton v. Mackleu*, 242

**JUDGMENT CREDITOR.**

A receiver appointed in a suit instituted by in-



cumbrancers was ordered to keep down the incumbrances out of the rents, and to pay the residue to the owner of the estate. A judgment creditor may file a bill against the owner and receiver, without making the other incumbrancers parties, to have his debt satisfied out of the surplus rents. *Lewis v. Lord Zouche*, 328

### JUDICIAL KNOWLEDGE.

See PUBLIC POLICY, 3, 4.

### JURISDICTION.

1. The court has no jurisdiction to deprive a father, living in adultery, of the custody of his child, unless he brings the child in contact with the woman with whom he is so living; nor to order him to permit the mother to have access to the child unless, misconduct on his part is shown with reference to the management and education of the child. *Ball v. Ball*, 35
  2. The court will not exercise its summary jurisdiction to compel a vendor's solicitor to perform an undertaking, given by him at the sale, to do certain acts for clearing the title to the estate. *Pearl v. Bushell*, 38
  3. The court has no authority to advance part of the fund in the cause to enable indigent parties to prosecute their claims to it. *Peck v. Beechy*, 40
  4. Courts of equity have a concurrent jurisdiction with the courts of law in relieving against promissory notes, &c. taken when over-due. *Hodgson v. Murray*, 515
  5. The court will not interfere to prevent the removal of the minister of a dissenting chapel, vested in trustees, when the deed is silent as to the mode of electing the minister and his continuance in office, and contains no provision for his support, but he is dependant for it on the voluntary contributions of his flock. *Porter and others v. Clarke and others*, 520
- See INJUNCTION, 2, 3, 6. SEQUESTRATION. SOLLICITOR.

### LANDLORD AND TENANT.

Testator devised an estate to several persons for their lives, successively, with power to grant leases, under certain restrictions. The first tenant for life grants a lease to a person who had no notice of the power, or that the lessor was tenant for life only. A subsequent tenant for life brings an ejectment against the lessee, on the ground that the lease was not made according to the power. The court will not prevent the lessee from setting up an old outstanding term created by the testator. *Goleborn v. Alcock*, 552

### LEGACY.

1. A testatrix, by her will, gave to T. S. 50s. a month during his life, in lieu of his giving up all other notes and claims; and by a codicil, she gave him 3l. a month during his life, and concluded by directing that all other things should be paid and done as directed by her will.

Held that T. S. was entitled to both the monthly payments. *Lord v. Sutcliffe*, 273

2. Testator by his will, gave an annuity payable out of his freehold, copyhold and personal estate; and, by a codicil not duly attested, revoked the annuity. Held, that it was a subsisting charge upon the freeholds. *Mortimer v. West*, 274
  3. In the progress of a suit for the administration of the testator's assets, which were more than sufficient to pay the legacies with interest, it was ordered that the master should ascertain one fourth part of the legacies and interest, and that the same should be paid out of a fund in the cause. Held that the payment ought to be applied, first, in discharge of the whole of the interest on the legacies, and then in the reduction of one fourth of the principal. *Thom. as v. Montgomery*, 348
- See CHOSE IN ACTION, 3.

### LEGACY DUTY.

An annuity, given by a will, clear of all deductions, was directed to be paid out of certain sums of stock standing in the testator's name: held that it was not subject to the legacy duty. *Dawkins v. Tatham*, 492

### LIMITATIONS.

See STATUTE OF LIMITATIONS.

### LOST INSTRUMENT.

See PARTIES, 1.

### MESSANGER.

See PRACTICE, 2.

### MILLS.

See TITHES, 1, 2, 3, 4.

### MODUS.

See PRODUCTION OF DOCUMENTS. TITHES, 6.

### MORTGAGE.

See PARTIES, 6. PLEA AND PLEADING, 10, 11.

### MORTMAIN.

A bequest of a sum of money to pay off a debt secured, by an equitable charge only, upon a meeting house is void. *Waterhouse v. Holmes*, 162

### MULTIFARIOUSNESS.

1. The infant heir and only son of an intestate, joined with his sisters in a bill, against their mother, the administratrix for an account of the intestate's real and personal estate. Demurrer for multifariousness, allowed. *Dunn v. Dunn*, 329
2. A. B. and C. being the next of kin, and B. and C. the co heirs of an intestate, file a bill against D. for an account of the real and personal estates of the intestate. The bill is multifarious. *Maud v. Achlom*, 331

### NE EXEAT.

See AMENDMENT, 1.

# NEW TRIAL.

A motion for a new trial must be made before the same jurisdiction as directed the former trial, although the judge may have been removed.  
*Footner v. Figes*, 319

# NOTICE.

See COMPENSATION. POLICY OF ASSURANCE.  
PUBLIC POLICY, 3, 4.

# OLD JUDGMENT.

See JUDGMENTS.

# ORDERS.

See CONSTRUCTION OF ORDERS.

# OUTSTANDING TERM.

See LANDLORD AND TENANT.

# PARENT AND CHILD.

The court has no jurisdiction to compel a father, living in adultery, of the custody of his child, unless he brings the child in contact with the woman with whom he is so living; nor to order him to permit the mother to have access to the child, unless misconduct on his part is shown, with reference to the management and education of the child. *Ball v. Ball*, 35

# PARTIES.

1. A bill will lie by the last indorsee of a lost bill of exchange to recover the amount from the acceptor, and prior indorsees need not be made parties to the suit. *Macartney v. Graham*, 285
  2. Some of the shareholders in a joint stock company may file a bill to have their deposits repaid, without making all the other shareholders parties if they are ignorant of their names. *Blain v. Agar*, 289
  3. Some of the members of a partnership cannot file a bill on behalf of themselves and the others, for a dissolution of the partnership: but all the members, however numerous, must be parties to the suit. *Long v. Yonge*, 369
  4. To a bill by a vicar for some of the tithes of certain lands in the parish, no persons except the occupiers ought to be made parties, although the defendants allege that the tithes in question have been always received or demanded by the rector, and state that it is uncertain whether their lands are or not within the parish. *Cook v. Blunt*, 417
  5. The mortgagor is a necessary party to a bill by a second mortgagee to redeem the first mortgage, and foreclose the equity of redemption. *Farmer v. Curtis*, 466
  6. A second mortgagee may file a bill of foreclosure against the mortgagor and third mortgagee, without making the first mortgagee a party. *Ross v. Page*, 471
- See JUDGMENT CREDITOR. PLEA AND PLEADING, 10, 11, 12.

# PARTNERSHIP.

See JOINT STOCK COMPANY.

# PAYMENT OF MONEY INTO COURT.

Moneys directed by settlement to be laid out in government or real securities, were lent, by the trustees to the husband, on bond; the trustees were ordered, on motion to pay the sums into court. *Collis v. Collis*, 365

See SEQUESTRATION.

# PENALTIES.

If a defendant pleads that giving the discovery sought by the bill will subject him to penalties, but between the filing and the hearing of the plea, the time for suing for the penalties expires, the plea will be overruled. *The Corporation of Trinity House v. Burge*, 411

See PLEA AND PLEADING, 3.

# PLAINTIFF.

See PRACTICE, 8.

# PLEA AND PLEADING.

1. If a defendant pleads that giving the discovery sought by the bill will subject him to penalties, but between the filing and the hearing of the plea, the time for suing for the penalties expires, the plea will be overruled. *The Corporation of Trinity House v. Burge*, 411
2. To a bill praying a reconveyance of four estates, the defendant put in a plea of a fine as to one; concluding with a disclaimer as to the others. The plea was overruled. *Watkins v. Stone*, 49
3. Where a bill charges a defendant with acts which would subject him to a criminal prosecution under a statute, the defendant need not plead the statute, but may demur to the bill. *Fleming v. St. John*, 181
4. To prevent a demurrer to a bill, it was falsely alleged in it that a revolted colony of Spain had been recognized by Great Britain as an independent state: the court is bound to know judicially, that the allegation is false, and not to give it the intended effect. *Taylor v. Barclay*, 213
5. An executor filed a bill before probate: plea that he had not proved the will allowed. *Simons v. Milman*, 241
6. Defendant, in her answer to a bill for tithes of a mill, said that it was an ancient mill, built before living memory; that no tithes had ever been paid for it, and that it had always been considered exempt from tithes. Held, that the exemption was well pleaded. *Townley v. Colegate*, 297
7. Some of the members of a partnership cannot file a bill, on behalf of themselves and the others, for a dissolution of the partnership; but all the members however numerous, must be parties to the suit. *Long v. Yonge*, 369
8. The statute of limitations, notwithstanding it is a defence at law, may be pleaded to a bill of discovery in aid of an action brought, provided it has been pleaded to the declaration. *Mac Gregor v. The East India Company*, 452
9. If the action was commenced before the bill was filed, the plea must aver that the cause of action did not accrue within six years before the action was brought. *Ibid*.
10. The mortgagor is a necessary party to a bill

- by a second mortgagee to redeem the first mortgage, and foreclose the equity of redemption, *Furner v. Curtis*, 466
11. A second mortgagee may file a bill of foreclosure against the mortgagor and third mortgagee, without making the first mortgagee a party. *Rose v. Page*, 471
12. An act of parliament for forming a joint stock company authorized all suits on behalf of the company, against any person to be commenced in the name of the chairman; and in all proceedings in which it would have been before necessary to state the names of the partners; it was made sufficient to state the name of the chairman only. Held, that the act did not authorize suits to be commenced by the chairman against one of the partners without making the others parties. *Mucmahon v. Upton*, 473
- See JUDGMENT CREDITOR. MULTIFARIOUSNESS. PARTIES. REVIVOR. STATUTE OF LIMITATIONS, 2. TITHES, 5.

### POLICY OF ASSURANCE.

The assignment of a policy of assurance on a life, does not take it out of the order and disposition of the assignor, if no notice of the assignment is given to the insurers. *Williams v. Thorp*. 257 See page 570

### POSSESSION, DELIVERY OF.

See PRACTICE, 13.

### POST OBIT.

Where a tenant in tail in remainder had agreed to pay a sum of money after the death and failure of issue of his brother, the tenant in tail in possession, and had secured the money by a mortgage of the estate, and covenanted to levy a fine and suffer a recovery to give effect to the mortgage, but on coming into possession of the estate refused to perform his covenant, the court appointed a receiver of the rents. *Free v. Hinde*, 7

### POWER.

1. Power to appoint, amongst testator's present or future grandchildren or their respective issue, does not authorize the donee to exclude the children of a deceased grandchild, who were living at the donee's death. *Garthwaite v. Robinson*, 43
2. A testator, in designating the objects of a power of appointment given to his daughter, used the words "issue," and "child or children," synonymously. In a subsequent part of his will he gave his son a power of appointment over a different part of his property, and in pointing out the objects of it, used the word "issue" simply. The son had both children and grandchildren living at his death. Held, that an exercise of the power in favor of the former only was void. *Dalsell v. Welch*, 319
- See CONSTRUCTION, 9. TRUST.

### PRACTICE.

1. Motion for leave to amend without prejudice, to a *ne exeat*, refused. *Grant v. Grant*, 14
2. If the messenger ordered to bring up a defendant, dies, the sergeant-at-arms will be ordered to go. *Macnab v. Menzies*, 16
3. Where a defendant, after notice of the plaintiff's intention to issue an attachment unless an order for time is obtained, procures the or-

der but is unable on account of the press of business, to get it drawn up, and omits to give the defendant notice of the order until an attachment is sealed, he cannot set aside the attachment. *Kirkpatrick v. Meere*, 16

4. An order for liberty to amend, and that plaintiff may answer amendments and exceptions at the same time, obtained before the filing of the report allowing the exceptions, is irregular. *Rushton v. Troughton*, 33
5. Motion by a plaintiff for an injunction to restrain an action brought by one defendant against a co-defendant, granted. *Kingham v. Maisey*, 41
6. A party, who omits to cross-examine a witness under a commission at the usual period, will be allowed to exhibit interrogatories for that purpose on a subsequent day. *Carter v. Draper*, 52
7. A plaintiff who had obtained the common injunction, as of course, procured an order to amend, and then obtained an injunction upon the amended bill by a motion of course. Held, that a special application ought to have been made. *Home v. Watson*, 85
8. If a defendant, who has been taken on an attachment, still refuses to answer, the plaintiff may, at the same time, proceed to enforce an answer by the process of this court, and bring an action against him and his sureties on the bond given to the sheriff under the attachment. *Beddall v. Page*, 224
9. Two witnesses having been examined by the plaintiff to prove the defendant's hand writing, said, that they did not believe it to be his hand writing. Leave was given to the plaintiff to examine fresh witnesses to the same point. *Greenwood v. Parsons*, 229
10. Moneys directed by a settlement to be laid out in government or real securities, were lent, by the trustees, to the husband, on bond: the trustees were ordered, on motion, to pay the sums into court. *Collis v. Collis*, 365
11. Three defendants were ordered to deliver up possession of estates to the receiver within a certain time, or to stand committed; but no writ of execution of the order was served on them. The defendants having refused to obey the order, the sergeant-at-arms was ordered to go against them. On the defendants being brought up in custody, it appeared that one of them was an infant, and he and another of them expressing contrition were ordered to be discharged on payment of costs; the third, persisting in his contempt, was committed. The two others remained in custody, being unable to pay their costs. A motion, afterwards made by the defendants, to discharge the orders of commitment, for irregularity was granted. *Green v. Green*, 394
12. Leave given to file a general demurrer after the second order for time had been taken out, the subpoena having been made returnable immediately, and there having been no wilful delay on the part of the defendants. *The Attorney General v. The Mayor and Corporation of Carlisle*, 427
13. Course of proceeding to be followed to compel a defendant to deliver possession of estates to a receiver. *Green v. Green*, 430
14. The thirteenth order does not apply to a case in which the answer was filed before the first day of Easter term, 1828. *Harris v. Harrison*, 431

15. Amendment of a bill, without serving a subpoena to answer the amendments, will not prevent the defendant from dismissing the bill. *Bramston v. Carter*, 458
16. A motion to dismiss a bill to perpetuate testimony, for want of prosecution, is irregular. The proper application is, that the plaintiff may proceed within a given time, or pay the defendant his costs. *Wright v. Tatham*, 459
17. On the 25th of November, plaintiffs filed a replication, and, on the 29th, a subpoena to rejoin, returnable immediately, tested on the 27th, but without obtaining an order for such subpoena; afterwards the defendants obtained an order to dismiss. Held, that the subpoena was irregular, and a motion to discharge the order of dismissal was refused. *Brown v. Moore*, 464
18. To prevent a suit from being revived, either a plea or demurrer must be put into a bill of revivor: an answer, insisting that the plaintiff has no right to revive is not sufficient. *Lewis v. Bridgman*, 465
19. Leave given to amend a bill, without prejudice to an injunction obtained on filing the bill. *Pickering v. Hanson*, 488
20. If, between the giving of notice of motion to dismiss and the making of the motion, plaintiff obtains an order to amend, the plaintiff must pay the costs of motion; but no order will be made upon it. *Davenport v. Menzies*, 514
21. The common injunction is not dissolved by the plaintiff obtaining an order to amend without saving the injunction, unless the record is altered. *Davis v. Davis*, 515
22. Although there are two suits in this court between parties having the same respective interests and relating to the same matters, the depositions of such only of the witnesses in the prior suit, as are dead, will be allowed to be read in the subsequent suit. *Carrington v. Cornock*, 567

SEE CONSOLIDATION OF SUITS. NEW TRIAL. SEQUESTRATION. WITNESSES, EXAMINATION OF.

PRINCIPAL AND SURETY.

1. A surety in a bond is not discharged by the creditor taking from the debtor a *cognovit* in an action he had brought against the debtor, with a stay of execution until a day earlier than that on which judgment could have been obtained in the regular course. *Hulme v. Coles*, 12
2. A surety for part of a debt is not entitled to the benefit of a security given by the debtor to the creditor, at a different time, for another part, of the debt. *Wade v. Cope*, 155
3. A., on taking B. as a clerk, took a bond from A., and a surety, to secure his duly accounting for his receipts; no time was fixed for the continuance of the service, but it was to be determinable at the option of either party. The surety died. His executrix gave notice to A. that she should no longer consider herself liable on the bond. A. read the notice to B., and required him to execute a new bond, with another surety which was done. Then B. died, and deficiencies were found in his accounts, subsequent to the notice. An injunction obtained, as of course, by the executrix, to restrain an action on the bond, was dissolved on the answer. *Gordon v. Calvert*, 253

See 4 Russ. 581

PRIORITY OF INCUMBRANCES.

Where, by the custom of a manor, no time is limited for presenting surrenders of copyholds, an incumbrancer, whose security has not been enrolled until long after a subsequent incumbrance, will not be postponed, although the subsequent incumbrancer had no notice of the prior charge. *Horlock v. Priestley*, 75

PROCESS.

If the messenger, ordered to bring up a defendant, dies, the serjeant-at-arms will be ordered to go. *Macnab v. Mensal*, 16  
See PRACTICE, 11, 13.

PRODUCTION OF DOCUMENTS.

A plaintiff in a title suit is entitled to a production of receipts for moduses and compositions, given to the defendants by the plaintiff and his predecessors, some of those receipts relating to tithes not sued for, and the other being evidence for the defendant and not for the plaintiff. *Tomlinson v. Lymer*, 489

PROMISSORY NOTE.

Courts of equity have a concurrent jurisdiction with courts of law in relieving against promissory notes taken when over-due. *Hodgson v. Murray*, 515

PUBLIC POLICY.

1. An agreement between two sons, to divide equally whatever property they may receive from their father in his life-time, or become entitled to under his will, or by descent or otherwise from him, is not contrary to public policy, but will be enforced in equity. *Wethered v. Wethered*, 183
2. An agreement between two persons having expectations from a third, to divide equally whatever he might leave them is valid. *Horwood v. Tooke*, 192
3. A revolted colony of Spain, not recognized as an independent state by Great Britain, executed bonds at 6 per cent. interest, as securities for a loan. P., acting in collusion with B., a holder of the bonds in England, by falsely representing that he had purchased some of them, induced the plaintiff to become a purchaser: Held, on demurrer, that the bonds were not usurious, as it did not appear, by the bill, that the contract for the loan was made, or the amount of it to be paid in this country; and P. and B. would have been answerable to the plaintiff for losses sustained upon his purchase, but that, as the original contract was made with a government not acknowledged by Great Britain, the court could not relieve him. *Thompson v. Powles*, 194
4. To prevent a demurrer to a bill, it was falsely alleged in it that a revolted colony of Spain had been recognized by Great Britain as an independent state; the court is bound to know, judicially, that the allegation is false and not to give it the intended effect. *Taylor v. Barrclay*, 213
5. The salary of the assistant parliamentary counsel to the treasury is not assignable; and

the court will not appoint a receiver of it.  
*Cooper v. Reilly*, 560

### RECEIVER.

Where a tenant in tail in remainder had agreed to pay a sum of money, after the death and failure of issue of his brother, the tenant in tail in possession, and had secured the money by a mortgage of the estate, and covenanted to levy a fine and suffer a recovery to give effect to the mortgage, but on coming into possession of the estate, refused to perform his covenant, the court appointed a receiver of the rents.  
*Free v. Hinde*, 7

See APPROPRIATION. PRACTICE, 13. PUBLIC POLICY, 5.

### RECTOR.

See PARTIES, 4.

### RESIDUE

See TENANT FOR LIFE OF RESIDUE.

### RESTRAINT ON ALIENATION.

See ALIENATION.

### RESTS.

See ACCOUNT.

### REVERSION.

See INTEREST.

### REVIVOR.

To prevent a suit from being revived, either a plea or demurrer must be put into the bill of revivor; an answer, insisting that the plaintiff has no right to revive, is not sufficient. *Lewis v. Bridgman*, 465

### REVOLTED COLONY.

See PUBLIC POLICY, 3, 4.

### SALARY.

The salary of assistant parliamentary counsel to the treasury, is not assignable, and the court will not appoint a receiver of it. *Cooper v. Reilly*, 560

### SCOTCH WILL.

See DOMICIL.

### SEQUESTRATION.

The court has no jurisdiction to order, upon motion, a person, not a party in the cause, to pay into court the arrears of an annuity, granted by him to a defendant, against whom a sequestration has issued for want of a sufficient answer unless the grantor has, by his conduct, waived the objection to the jurisdiction, but he may, notwithstanding, (without applying for the leave of the court) obtain from the grantee a release of the annuity. *Johnson v. Chippindall*, 55

### SERGEANT AT ARMS.

See PRACTICE, 2, 11.

### SET OFF.

See INJUNCTION, 3. SPECIFIC PERFORMANCE.

### SOLICITOR.

The court will not exercise its summary jurisdiction to compel a vendor's solicitor to perform an undertaking, given by him at the sale, to do certain acts for clearing the title to the estate. *Peart v. Bushell*, 38  
See COSTS, 1, 2.

### SPECIFIC PERFORMANCE.

One of the terms of an agreement was, that the contract should be void if the purchaser's counsel should be of opinion that a marketable title could not be made by a certain time. The counsel being of that opinion, a bill by the purchaser for a specific performance, with a compensation, was dismissed with costs; and an application afterwards made by the plaintiff, that his deposit might be set off against the defendant's costs, and the surplus (if any) paid to him, was refused with costs. *Williams v. Edwards*, 78

See AGREEMENT. COMPENSATION. NOTICE. VENDOR AND PURCHASER, 6.

### SPECIALTY DEBT.

By deed between A. and B. it was agreed that a sum in the hands of A., but belonging to B., should be laid out in the funds, in A.'s name, in trust for B.; A. died never having invested the money; Held, that B. was a specialty creditor of A. for the amount. *Mavor v. Desport*, 227

### STATUTE OF LIMITATIONS.

1. The statute of limitations, notwithstanding it is a defence at law may be pleaded to a bill of discovery in aid of an action brought, provided it has been pleaded to the declaration. If the action was commenced before the bill was filed, the plea must aver that the cause of the action did not accrue within six years before the action was brought. *Mac Gregor v. The East India Company*, 452
2. A plea of the statute of limitations need not deny the usual allegation that the defendants have books, &c. in their custody, unless it is alleged that those books, &c. would show that a promise had been made within six years. *Ibid.* 454

### STATUTE 54, G. 3, C. 168.

See WILL, 15.

### SUBPENA.

See ATTACHMENT, 2. DISMISSAL OF BILL, 1, 2.

### SUPPLEMENTAL ANSWER.

Defendant, in her answer to a bill for tithes, pleaded a modus for all tithes. She then discovered that the modus covered part only of the tithes, and moved to correct the mistake by filing a supplemental answer: Ordered, that the cause should proceed as if the modus had been laid in the manner proposed. *Fedmore v. Skipwith*, 565

SUPPLEMENTAL BILL.

The defendant in his answer to a bill filed by the assignees of a bankrupt, alleged that the plaintiffs had not obtained the necessary consent to the institution of the suit; upon which the plaintiffs filed a supplemental bill, stating, that since the filing of the original bill, they had obtained the necessary consent: Demurrer to the supplemental bill allowed. *King v. Tullock*, 469

See p. 570

SURETY.

See PRINCIPAL AND SURETY.

TENANT BY THE CURTESY.

Devise to A. and her heirs: But if she died leaving issue, then to such issue and their heirs. A. died leaving issue. Held, that her husband was not entitled to be tenant by the curtesy. *Barker v. Barker*, 249

TENANT FOR LIFE.

Devise to trustees, in trust to sell, for payment of debts, and subject thereto, to A. for life, *sans* waste, remainder to his first and other sons in tail. The trustee sold timber on the estate, and applied the proceeds in payment of the debts: Held, that A. was entitled to have the amount raised by sale of the estates, and paid to him. *Davies v. Wescomb*, 425  
See LANDLORD AND TENANT.

TENANT FOR LIFE, AND REMAINDERMAN.

Devise to trustees and their heirs during the life of A. in trust for A., and after his decease to B. in fee. The trustees recover in A.'s lifetime, damages for breach of covenants in a lease granted by the testatrix, and still subsisting. A. dies. The damages belong to her estate. *Noble v. Cass*, 343

TENANT FOR LIFE OF RESIDUE.

The tenant for life of a residue, which is directed to be laid out in certain securities, is entitled to the income accrued in the first year after the testator's decease, on such parts of the testator's estate as are invested at his death, in the proper securities, and on such parts as are afterwards so invested within the same year; but the income, before such investment, forms part of the capital of the residue. *La Terriere v. Bulmer*, 18

TENANT IN TAIL.

See RECEIVER.

TERM, (Outstanding.)

See LANDLORD AND TENANT.

TERRIER.

A terrier is evidence as to personal tithes. *Townley v. Colegate*, 297

TESTIMONY.

See BILL TO PERPETUATE TESTIMONY. DEPOSITIONS. EVIDENCE.

VOL. II.

THIRTEENTH ORDER.

See AMENDMENT, 2.

TIMBER.

See TENANT FOR LIFE.

TITHES.

1. Defendant, in her answer to a bill for tithes of a mill, said that it was an ancient mill, built before living memory; that no tithes had ever been paid for it; and that it had always been considered exempt from tithes: Held, that the exemption was well pleaded.
2. A miller who grinds his own corn, and sells the flour, is not liable to tithes for such mill.
3. A terrier is evidence as to personal tithes. Issue directed on the application of a vicar, to try the right to tithes. *Townley v. Colegate*, 297
4. A miller who only grinds his own corn and sells the flour, is not liable to tithes for his mill. *Broune v. Woolsey*, 305
5. To a bill by a vicar for some of the tithes of certain lands in the parish, no persons except the occupiers ought to be made parties, although the defendants allege that the tithes in question have been always received or demanded by the rector, and state that it is uncertain whether their lands are or not within the parish. *Cook v. Blunt*, 417
6. Defendant, in her answer to a bill for tithes, pleaded a modus for all tithes. She then discovered that the modus covered part only of the tithes, and moved to correct the mistake by filing a supplemental answer: Ordered, that the cause should proceed as if the modus had been laid in the manner proposed. *Podmore v. Skipwith*, 565  
See DEPOSITIONS. ISSUE. PRODUCTION OF DOCUMENTS.

TITLE.

Old judgments existing against a former owner of leaseholds, who parted with the property in 1770, and to enforce which, no steps appeared to have been taken, are no objection to the title. *Causton v. Mackles*, 242  
See SOLICITOR, 1.

TRUST.

A trust for sale vested in A. and his heirs, cannot be executed by an assign of A. *Bradford v. Belfield*, 264

TRUSTEE.

A trustee of a charity estate, who used the balances of the rents in carrying on his trade, will be charged with interest, at five per cent, but not with annual rests. *Attorney General v. Solly*, 518  
See CONVERSION. INFANT TRUSTEE. PAYMENT OF MONEY INTO COURT.

UNCERTAINTY.

See WILL, 15.

## USURY.

A revolted colony of Spain, not recognized as an independant state by Great Britain, executed bonds at six per cent interest as securities for a loan. P., acting in collusion with B., a holder of the bonds in England, by falsely representing that he had purchased some of them, induced the plaintiff to become a purchaser. Held, on demurrer, that the bonds were not usurious, as it did not appear by the bill that the contract for the loan was made, or the amount of it to be paid in this country; that P. & B. would have been answerable to the plaintiff for losses sustained upon his purchase, but that, as the original contract was made with a government not acknowledged by Great Britain, the court could not relieve him. *Thompson v. Powles*, 194

## VENDOR AND PURCHASER.

1. One of the terms of an agreement was, that the contract should be void if the purchaser's counsel should be of opinion that a marketable title could not be made by a certain time. The counsel being of that opinion, a bill, by the purchaser, for a specific performance, with a compensation, was dismissed with costs. And an application, afterwards made by the plaintiff, that his deposit might be set off against the defendants costs, and the surplus (if any) paid to him, was refused with costs. *Williams v. Edwards*, 78
2. A revolted colony of Spain, not recognized as an independent state by Great Britain, executed bonds at six per cent. interest as securities for a loan. P., acting in collusion with B., a holder of the bonds in England, by falsely representing that he had purchased some of them, induced the plaintiff to become a purchaser. Held, on demurrer, that the bonds were not usurious, as it did not appear, by the bill, that the contract for the loan was made, or the amount of it to be paid in this country; that P. and B. would have been answerable to the plaintiff for losses sustained upon his purchase; but that, as the original contract was made with a government not acknowledged by Great Britain, the court could not relieve him. *Thompson v. Powles*, 194
3. Old judgments existing against a former owner of leaseholds, who parted with the property in 1770, and to enforce which no steps appeared to have been taken, are no objection to the title. *Custon v. Macklew*, 242
4. A purchaser of a reversion ordered to pay interest on his purchase money from the time of the purchase. *Trefusis v. Lord Clinton*, 359
5. An estate consisting of fen land, and so described in the particulars of sale, was charged by a local but public act of parliament, with drainage and embanking taxes, of which the purchaser had no express notice: held, that he was not entitled to a compensation for those taxes. *Barraud v. Archer*, 433
6. A copyholder covenants to surrender to trustees in trust to sell, and dies before surrender, leaving an infant heir; the covenantees agree to sell the estate, and afterward file a bill for a specific performance. Held, that the heir is not an infant trustee within 6 G. 4, c. 74; and

therefore cannot be ordered to surrender immediately, and consequently that the bill must be dismissed with costs. *King v. Turner*, 549  
See JURISDICTION, 2.

## VESTING OF PORTIONS.

Testator gave to his widow a life-interest in a fund with a power of appointment, amongst all his children as should be living at her death; and in default of appointment, directed the fund to be divided amongst all such children, with a gift over to the widow, in case all the children died before their shares became payable. The widow appointed the fund to the two surviving children; one of them died in her life-time. Held that the only surviving child, took, upon the widow's death, the whole of the fund. *Bielefeld v. Record*, 354  
See WILL, 3.

## VICAR.

See ISSUE.

## WIDOW.

See CHOSE IN ACTION, 2. 3.

## WILL.

1. The tenant for life of a residue, which is directed to be laid out in certain securities, is entitled to the income accrued in the first year after the testator's decease, on such parts of the testator's estates as are invested, at his death, in the proper securities, and on such parts as are afterwards so invested within the same year; but the income, before such investment, forms part of the capital of the residue. *La Terriere v. Bulmer*, 18
2. Testator gave a copyhold estate to trustees for his wife until the leases to which it was subject expired, and directed that then it should be sold and the proceeds be invested for the benefit of his children; but if his wife should die before the leases expired, that it should be immediately sold and the proceeds disposed of as before. The wife survived the children, but died before the leases expired. The surviving trustee, who claimed the estate for his own benefit, was decreed to surrender it to the administrator of the children, but without prejudice to the rights of the customary heirs of the testator, or children, if any such heirs were in existence. *Barton v. Hodsoil*, 24
3. Testator directed his executors to purchase, out of his residuary estate, a certain sum of stock, and to pay the dividends to his wife for her life, and after her death to divide the capital between such of his three daughters as should be then living; provided that if any one of them should be then dead, or should afterwards die before her share should become payable or divisible, leaving a child or children, that share should go to such child or children. The testator's wife died in his life-time. One of the daughters died three months after the testator: held, nevertheless, that she had a vested interest in one of the shares. *Collins v. Macpherson*, 87
4. Devise to A. for life, and to her heirs the issue of her body, forever, for their lives; and in case A. has no son, then to her eldest daughter

- ter; followed by a proviso, containing a devise over, if A. left no issue, or they should become extinct, creates an estate tail in A. *Reece v. Steel*, 233
5. By Mr. and Mrs. P.'s marriage settlement, estates in Kent and other counties, the lady's property, were settled on her for life, remainder to Mr. P. for life, if she should so appoint, remainder to their children, remainder as Mrs. P., by deed, under her hand and seal, *attested*, &c., or by her will signed and published in the presence of three witnesses, should appoint; remainder to Mrs. P. in fee, with a power of sale and directions for re-investing the proceeds in other estates, and in the usual securities in the interim; and that upon the re-investment, the uses of the settlement should cease as to the sold estates. Mrs. P., by deed not attested as to her signature, (at the foot of which she had written, without date, directions for her burial,) appointed the estates, after her decease, to her husband for life, and in default of children, to him in fee; and she revoked a prior deed of appointment. The estates were afterwards sold, and the proceeds invested in securities, but were never re-invested in lands, although their liability to be so was recognized by the parties. There was no issue of the marriage. Mrs. P. survived her husband, and applied part of the proceeds to her own use. At her death she was seised (exclusive of the settled property) of a mansion-house, with out-buildings, gardens, and a small field adjoining it, and some cottages opposite to it, let to tenants, and was possessed of some personal estate, no part of which was in the name of a trustee. She devised the mansion house, with its appurtenances, and all other her real estates, to C. S., and bequeathed all her personal estate whether in the name of herself or of any trustee, subject expressly to her debts and legacies to other persons; after her death the deed of appointment was found in her house, with the title-deeds of the mansion-house; but the revoked deed could not be found. Her debts and legacies greatly exceeded her assets. Held, that the former deed was not a testamentary instrument, and that Mrs. P.'s receiving part of the proceeds of the settled estates, was not an entry or claim within 54 Geo. 3, c. 168; but that that statute remedied the defect of attestation: that the remaining proceeds remained as real estate, but did not pass either to the devisees or the residuary legatees; that Mr P.'s co-heirs in gavelkind were not entitled to any part but that the whole belonged to his heir at law under the appointment. *Hougham v. Sandys*, 95
6. Devise to A. and her heirs, but if she died, leaving issue, then to such issue and their heirs. A. died, leaving issue: held, that her husband was not entitled to be tenant by the courtesy. *Barker v. Barker*, 249
7. Testator gave to his heir one shilling, and devised to W. B. all his lands; and in the next sentence, gave to him all his goods, chattels, personal and testamentary estate: held that the fee-simple of the lands passed to W. B. *Bradford v. Belfield*, 264
8. Devise to A. B. C., &c., share and share alike, for their lives, remainder to their respective children, for their lives, and so to be continued, from issue to issue, for life. But, if any of them die, leaving no issue, their shares to go to the survivors, for their lives, and the issue of such of them as shall be dead, and in default of issue, then over: held, that A. B. C., take estates tail, with cross-remainders. *Mortimer v. West*, 274
9. A testator in designating the objects of a power of appointment given to his daughter, used the words "issue," and "child or children," synonymously. In a subsequent part of his will, he gave his son a power of appointment over a different part of his property, and in pointing out the objects used the word "issue" simply. The son had both children and grandchildren living at his death: held, that an exercise of the power in favor of the former only was void. *Dalzel v. Welch*, 319
10. Testator gave to his widow a life-interest in a fund, with a power of appointment amongst all his children living at her death; and in default of appointment, directed the fund to be divided amongst all such children, with a gift over to the widow, in case all the children died before their shares became payable. The widow appointed the fund to the two surviving children; one of them died in her life time: held that the only surviving child took, upon the widow's death the whole of the fund. *Bielefield v. Record*, 354
11. Bequest of 40*l.* per annum to A. for life, and after her decease, to B. or his heirs: held, that "or" must be construed disjunctively; and that therefore, B. did not take an absolute interest in the annuity. *Girdlestone v. Doe*, 225
12. J. B. at his death had a balance due from his banker and was also entitled to a share of the balance due to A. B. from his banker, A. B. having received monies for him from time to time, and with his knowledge, paid them to his own banker, as his own money. But J. B. had no concern with those bankers, nor did they know he was interested in the monies paid by A. B. J. B. bequeaths all his money in the hands of any banker: held, that his balance at his own bankers, and also his share of A. B.'s balance will pass; and that evidence is admissible to show that he so intended. *Benson v. Whittam*, 493
13. Testator gave to his daughter and her children 5,000*l.*; 3,000*l.* to be paid in one year after his decease, and 2,000*l.* after the decease of his wife, and appointed A. B. trustee of those sums for his daughter and her children. The court declared the 5,000*l.* to be in trust for the daughter for life, and after her decease for all her children, whether born in the testator's life time, or after his decease. *Morse v. Morse*, 495
14. Bequest to H. D for his own use, and in case he should die in the testator's life time or afterwards, without having any child or children, then over. H. D. survived the testator, and died without having had a child: held, that the gift over took effect. *Stone v. Maule*, 497
15. A testator who had long resided in India gave a legacy "to T. P., who resided at such place when I left England, or to his heirs, executors, administrators or assigns." T. P. died in the



testator's life-time: held, that the bequest over  
was void for uncertainty. *Waite v. Templer*,  
524

See CONSTRUCTION. COPYHOLD. DOMICIL. LE-  
GACY, 1, 2. TENANT BY THE CURTESY.

#### WITNESSES, (EXAMINATION OF.)

In support of a charge brought in under the de-

crees, two witnesses examined by the plaintiff  
to prove the defendant's hand writing, said  
that they did not believe it to be his hand  
writing: leave was given to the plaintiff to  
examine fresh witnesses to the same point.  
*Greenwood v. Parsons*, 229

See CROSS-EXAMINATION OF WITNESSES. DEPO-  
SITIONS.

END OF VOLUME II.

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